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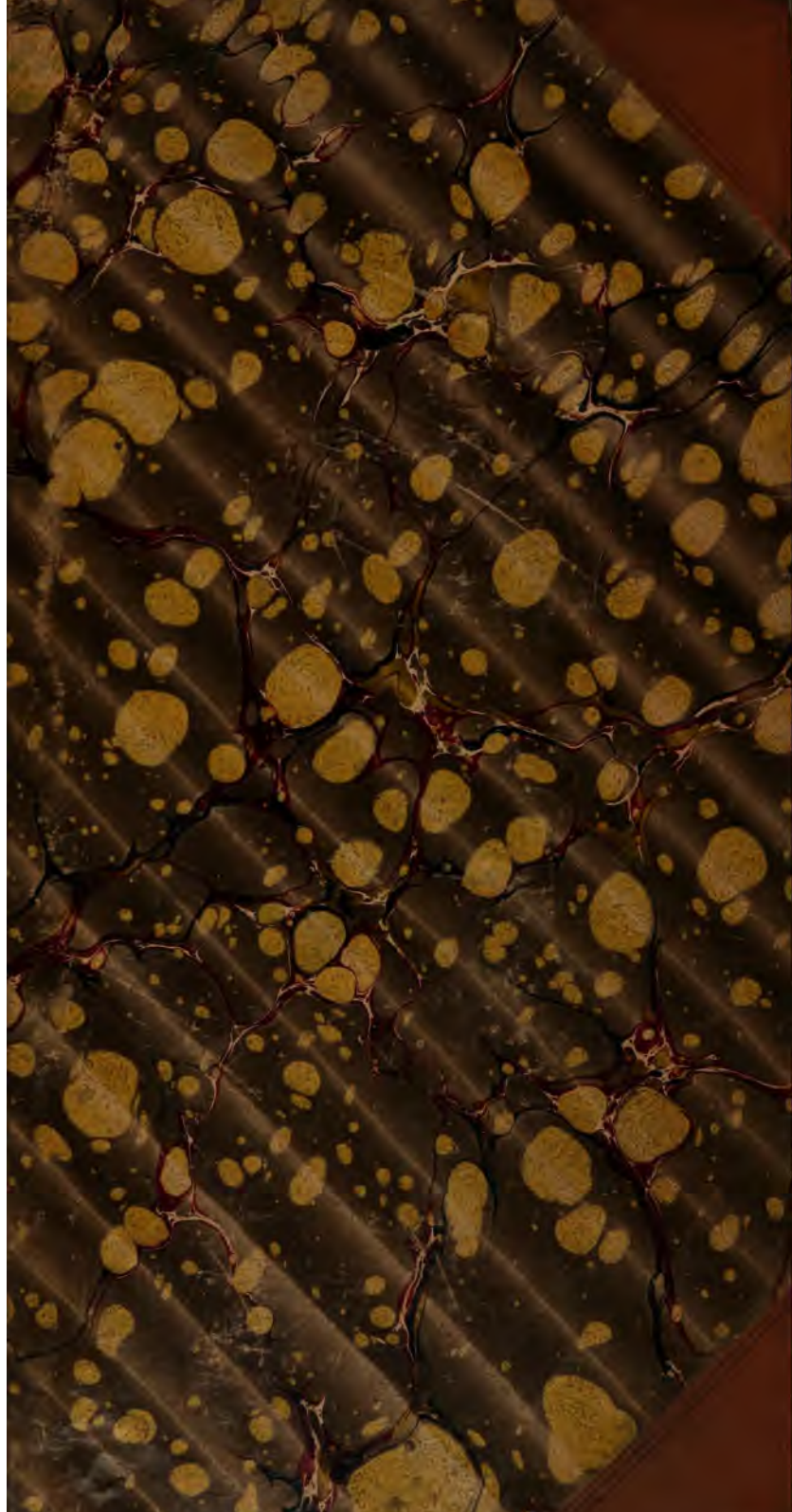
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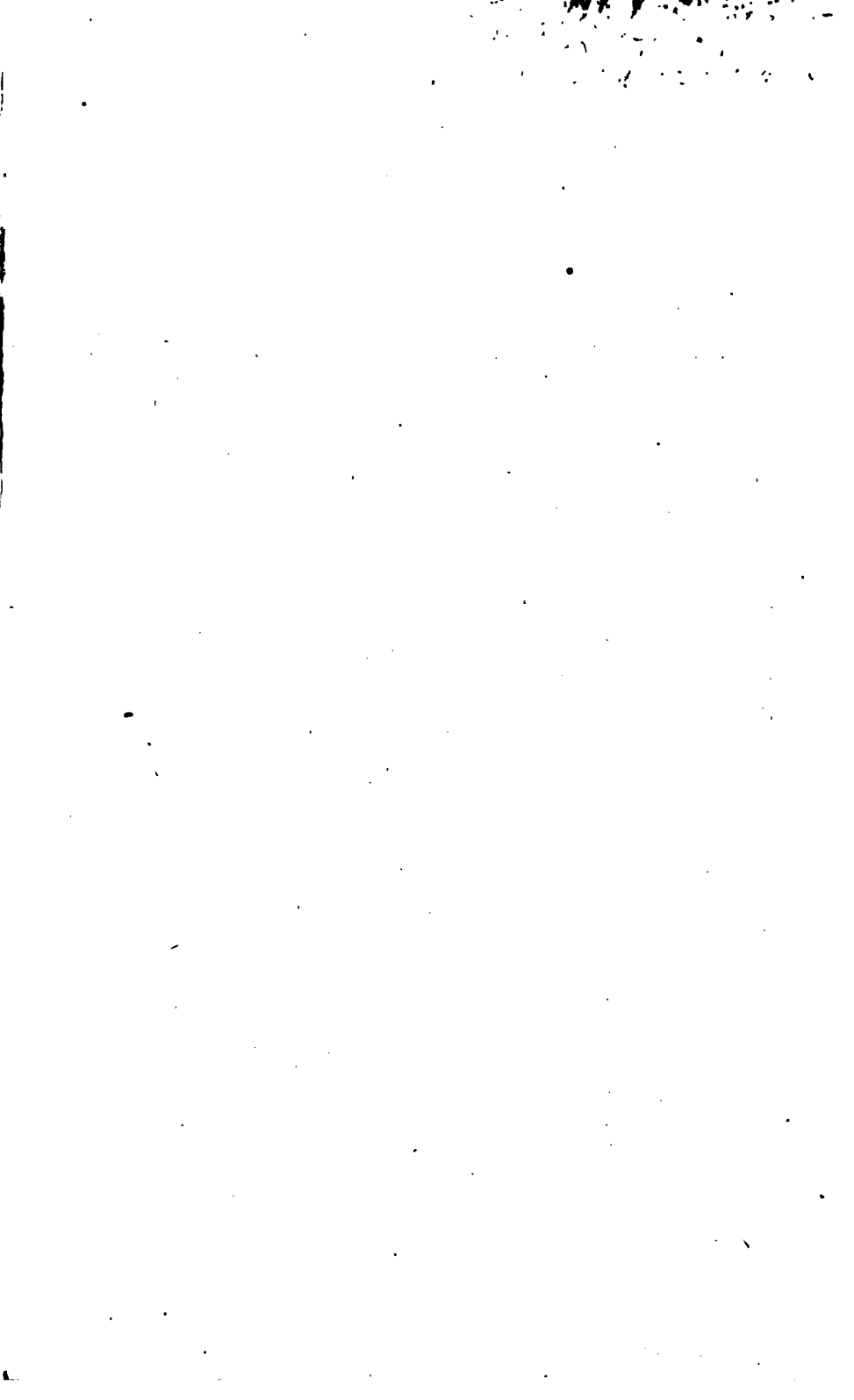
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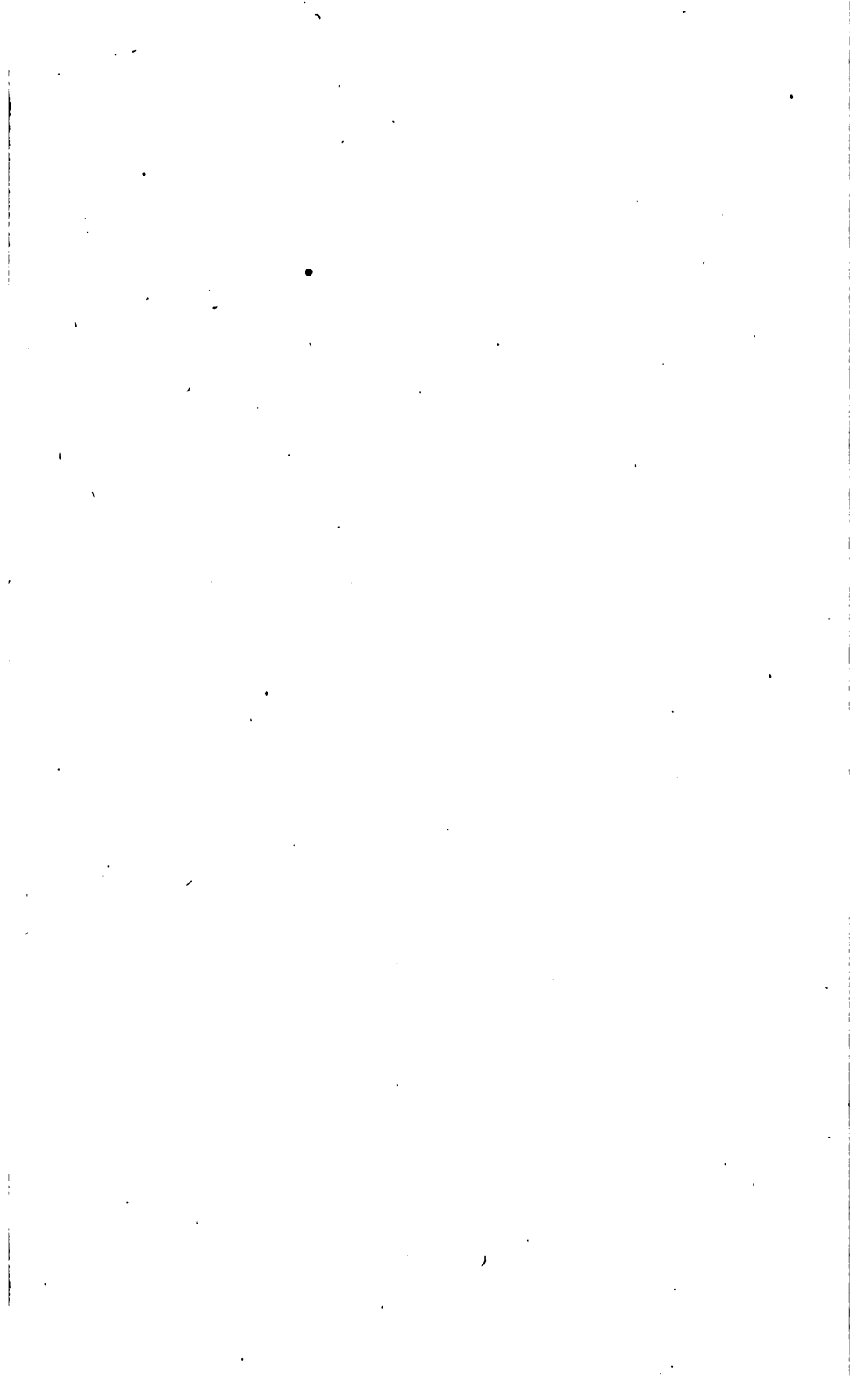
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THE LAW MAGAZINE.

ART. I.—THE FIFTH REPORT OF THE CRIMINAL LAW COMMISSIONERS.

Fifth Report of Her Majesty's Commissioners on Criminal Law, dated 22nd April, 1840. Presented to both Houses of Parliament by command of Her Majesty. London, 1840.

WHATEVER the cause,—whether from changes of persons, greater familiarity with the subject matter, the caution taught by criticism, or the mastery acquired from practice, it is an undoubted fact that each succeeding Report of the Criminal Law Commission has manifested a marked improvement upon its predecessor; and so long as this is the case, we feel no disposition to twit them with inconsistency.

It is sufficiently obvious, indeed, that they started with a most undue estimate of the extent of their authority; the whole criminal law of England was to be recast, and their labours were to throw into the shade those of all preceding codifiers from Tribonian to Feuerbach. Finding themselves pulled up rather sharply, they turned restive or rather sulky, and described their authority as limited to the declaration of the existing law; which it most assuredly was not, as we took the liberty of informing them. Both extremes, therefore, having been tried without success, they had no alternative but to act on the *juste milieu* principle, and in the Report now before us they at length proceed on that construction of their authority which it required no inconsiderable portion of blindness or wrongheadedness to help adopting from the first; namely, that though the strict letter of the commission confined them to making digests, the obvious intent was that they should suggest such improvements as they might deem fit.

The plan of the Report is thus stated:

“WE Your Majesty's Commissioners, whose hands are here-

unto set, do humbly submit to Your Majesty, in our present Report, the Consolidation of the Law of England respecting the following Offences:—

I. Burglary;

II. Offences against the Executive Power, including, under the branch which relates to the Administration of Justice, the crimes of Bribery, Perjury, Subornation of Perjury, and False Swearing, Embracery, Barretry, Maintenance, and Champerty;

III. Forgery;

IV. Offences against the Public Peace, including Riots, Unlawful Assemblies, Affrays, and Forcible Entries;

And we have prefixed to the several parts of the Digest such prefatory observations as have appeared to be necessary for the purpose of explaining the principles upon which the law is founded, and also the reasons for the course which we have adopted in its consolidation.

“Before we proceed to state our remarks and suggestions upon the subjects mentioned, we think it proper to submit to Your Majesty an outline of the plan we have pursued, with a view to attain the object of Your Majesty’s Commission,—the reducing the Criminal Law to a more compendious form, and rendering it more certain and accessible.

“Having received Your Majesty’s commands to report our proceedings from time to time, we have deemed it to be expedient, with a view to the effectual execution of our labours, to submit portions of our Digest in such a state as may afford the best means for enabling others to judge of the manner in which it has been executed, and more especially of the propriety of the alterations which we have suggested. We deem it, indeed, to be essentially requisite, in a matter of such great national importance as the Consolidation of the Criminal Law, that professional criticism should be freely invited by a full exposition of the principles by which we have been guided in discharging the duty assigned to us. With reference to this object, as well as the ultimate design of the Commission, the portion of our Digest submitted to Your Majesty in the present Report has been constructed. We have, with this view, frequently inserted not only articles corresponding with the present state of the Law, but also others more general and

compendious, by which, if adopted, the former will be superseded; and, with respect to these, the extent of the Digest will hereafter be considerably reduced by the rejection either of the former or the latter. We have omitted no existing provision of the Statute Law without expressly referring to it or setting it forth either in the Prefatory Remarks or Notes, and stating our reasons for the proposed rejection.¹ Where any alteration has been made in the terms of an existing law, attention has been drawn to it, and our grounds for making it have been explained; and where any new enactment has been proposed, the like notice has been given, and the reason for its introduction has been stated. We trust that we have, by this course, afforded sufficient means, not only for forming a correct estimate of the suggestions which we have made, but also for determining what course may be the most convenient where we have not ventured to give any express opinion."

A few general observations of a prefatory kind follow. It is observed that several of the articles now included in the Digest as aggravations of offences may probably be considered unnecessary when the classes of penalties shall be completed and each offence referred to its class; and that an enlarged discretion in the judge as to the extent of punishment will supersede the necessity for defining particular aggravations of the offence. Attention is also called to the circumstance, that the part of the Digest including offences against the administration of justice (maintenance, champerty, barratry &c.) involves the repeal of many ancient statutes, which the change of manners has rendered useless and obsolete; and that the statutes touching escapes, rescues &c. contain much repetition and may be advantageously reduced. They state that, in giving the more ancient enactments, they have adhered to the literal translation of the Norman French originals,—the text on which judicial decision is the commentary; and then comes a paragraph, which ought to have succeeded or been amalgamated with the preceding one, on the propriety of marking out the aggravations of offences:

"Whilst we suggest that some of the Articles now inserted in the Digest may become unnecessary, we think it proper to

¹ Reference to the existing Statutes is much facilitated by the Appendix to the Fourth Report on Criminal Law.

notice an important principle, to which we have already alluded, viz., the policy of marking the *principal divisions of offences* as they are termed by Beccaria,¹ a rule which is expedient, not only lest 'to crimes of the first degree be assigned punishments of the last,' but also for the purpose of specially admonishing offenders of the higher degrees of criminality attached by the law to offences accompanied with peculiar aggravations. So far as regards legal certainty and precision, it may be unimportant whether a more general law comprehends a wide range of crimes without marking aggravations, the adequate punishment of which is left to the discretion of the court, or whether severer penalties are attached to such aggravations by specific rules; but with a view to the prevention of aggravated offences, the expediency of giving more explicit notice of the higher degree of criminality, and of the severer penalties attached to those offences, is sufficiently obvious."

So far as regards legal certainty and precision, it surely is not unimportant whether circumstances of aggravation are marked out by the law or abandoned to the discretion of the judge; and if the law were rendered neither more certain nor more precise by such markings out, we should be glad to know how aggravated offences could be prevented by it. The completest uniformity of decision, extending over a long space of time, would be required to convey the same public impression as a specific article in a digest.

The following remarks are just:

"We have frequently, as will be seen from the notes to the Digest, introduced Articles of a declaratory or explanatory nature which are not absolutely necessary; and in this respect we have preferred laying ourselves open to the charge of having done too much to that of having done too little. As one principal object of a consolidation of the criminal law is to render it more accessible to all, it is not, we conceive, sufficient to lay down particular rules in which certain principles are embodied, leaving other practical rules to be deduced by a process of reasoning. To enable the great mass of society to obey the law, detailed practical rules are absolutely essential.

¹ Chap. 47. See Fourth Report of the Commissioners on Criminal Law, p. 3.

“ It may, perhaps, appear that we have omitted some rules which ought to have been inserted, particularly as regards aiders and abettors, principals in the first and second degree, and accessories. We propose hereafter to provide for these by general rules, applicable to the whole range of crimes; the interposition of provisions of this kind in digesting particular offences would occasion much unnecessary repetition.”

They explain that, in digesting the law regarding offences against the executive power, it has been found necessary, in the first instance, to provide for the punishment of all official delinquencies and all illegal obstructions of official duties generally, and then to prohibit specially offences against particular branches of the executive. The propriety of this course will be best examined when we come to the second section of the Report.

The subject of the first section is *Burglary*; and a good lesson it affords to those, who, regardless of the imperfections of language, think nothing wanting to constitute a good system of legislation but for the legislator to have a clear purpose in his mind.

Burglary is a breaking into a dwelling-house at night with the intent to commit a felony. State this definition to an unlearned reader, and he will see no difficulty whatever. Turn to a practised lawyer, and every word becomes pregnant with doubts. What is a breaking? What is a dwelling? What is a house? Whose house or whose dwelling is it? These are the main questions that instantly suggest themselves, and boundless are the combinations of circumstances where no satisfactory reply can be given to them.

1. Breaking must originally have meant an actual entry by force, but it was soon found necessary to extend the meaning of the term. The offender descends a chimney or ascends through a trap-door which has been left unfastened: he gets in by bribing the servant or through some false pretence. The entry is clearly illegal, and the judges hold it to be a breaking within the scope of the law. Or he is interrupted, and is never actually within the dwelling-house; still if so much as a hand or instrument be introduced, the offence is for all legal purposes complete.

“ It is deemed an entry where the ‘ thief breaketh the house, and

his body, or any part thereof, as his foot or his arm, is within any part of the house, or where he putteth a gun into a window which he hath broken, though his hand be not in,' 3 Inst. 64. 'Thieves came in the night to rob A., who, perceiving it, opens his door, and issues out and strikes one of the thieves with a staff. Another thief having a pistol in his hand, perceiving others in the entry ready to interrupt them, puts his pistol within the door over the threshold and shot, so that his hand was over the threshold, but neither his foot nor the rest of his body; and upon this evidence by great advice it was adjudged burglary, and the thief was hanged.' 1 Hale's P. C. 553. In the case of *R. v. Rust*, 1 Moody's C. C. p. 183, it was held that the throwing up a window and introducing an instrument between such window and an inside shutter to *force open the shutter* is not sufficient to constitute burglary, if the hand, or some part of it, be not within the window. It should seem that even if the hand had been introduced this would not have been burglary, if done merely to facilitate entrance and not to commit a felony; if done for the former purpose only, there seems to be no distinction between the inserting the hand and the inserting any other instrument."

Perhaps it may be equally advisable to illustrate the former part of our statement by authorities :

"Thieves, having an intent to rob, raised the hue and cry, and brought the constable, to whom the owner opened the door, and when they came in, they bound the constable and robbed the owner; held burglary. So, if admission be gained under pretence of business, or if one take lodgings with a like felonious intent, and afterwards rob the landlord : for the entrance was gained by fraud, and the law will not endure to have its justice defrauded by such evasions. By the same reasoning, getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits, without any colour of title, and then rifling the house, was ruled to be a breaking of the house, and consequently, if it had been done in the night-time, would have amounted to burglary. 2 East's P. C. 485. In *Ann Hawkins's* case, it appeared that the prisoner was acquainted with the house, and knew that the family were in the country. Meeting with the boy who kept the key, she desired him to go with her to the house, and to induce him promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in. She then sent the boy for the pot of ale, robbed the house, and went off. This being in the night-time was adjudged to be clearly burglary in the woman, for she prevailed with

the boy by fraud to open the door with intent that she might rob the house. 2 East's P. C. 485. 'If A., the servant of B., conspires with C. to let him in to rob B., and accordingly A. in the night-time opens the door or window and lets him in, this is burglary in both; for if it be burglary in C. it must needs be so in A., because he is present, and aiding to C. to commit this burglary.' 1 Hale's P. C. 553.

"There is no doubt that by the law of the present day the entry described in this Article would be a *breaking*; it is, however, obviously a constructive breaking only. Lord Hale says, 'There was one arraigned before me at Cambridge for burglary, and upon the evidence it appeared that he crept down a chimney. I was doubtful whether this were burglary, and so were some others; but upon examination it appeared, that in his creeping down some of the bricks of the chimney were loosened, and fell down in the room, which put it out of question.' 1 Hale's P. C. 552. In most of the text-books it has been laid down, notwithstanding the reasonable doubt expressed by Hale, that it was a breaking to creep down a chimney; because the house was as much shut as the nature of the thing would admit of: see 1 Hawkins's P. C. c. 38, s. 6; 2 East's P. C. 485. And at last, in Price's Case, Russell and Ryan's Crown Cases, p. 450, it was resolved, by a majority of the judges, that it was a sufficient breaking and entering of a house to constitute burglary if the offender got into the chimney, though he did not enter any of the rooms of the house.

"Cornwall was indicted with another person for burglary. It appeared that he was a servant in the house, and in the night-time opened the street door and let in the other prisoner, who robbed the house. Cornwall then let him out at the door, but did not go out with him. It was doubted at first whether this was burglary in the servant, as he did not go out with the other prisoner; but at a meeting of all the judges, they were unanimously of opinion that it was burglary in both, and accordingly Cornwall was executed.—2 East's P. C. 486."

These are quotations from the notes. The following passage forms part of the prefatory remarks:

"On the other hand, it has in several cases been questioned whether the raising of a trap-door, kept in its closed position by the mere force of gravity, was a sufficient breaking. In Callan's Case¹, a heavy flat door of a cellar, which would keep closed by its own weight, and would require some de-

¹ Russell and Ryan's Crown Cases, 157.

gree of force to raise it, had been opened. The door had bolts on the inside by which it might have been fastened, but it did not appear that it was so fastened at the time of the imputed offence. The judges were divided in opinion whether the opening of this door was such a breaking of the house as constituted burglary. On the other hand, it was holden in *Brown's Case*¹, that the opening of a similar trap-door was a sufficient breaking, and the only perceptible distinction between these cases is; that in *Brown's Case* there were no interior fastenings at all, whereas in *Callan's Case* there were fastenings, though they were not used. In *Russell's Case*, 1 *Moody's Crown Cases*, 377, in the discussion of which *Callan's Case* and *Brown's Case* were considered, an entry was made through a cellar, the entrance to which from the outside was by a flap which let down, and by raising which the prisoner had entered. The flap had been occasionally fastened with nails, but the jury found that on the night in question it had not been nailed down. In this case the judges held that the breaking was sufficient. The result, however, of those cases and the impression of the profession are that the lifting up of a trap-door, although unfastened, is sufficient. If this be correct, it seems to follow that the mere opening of a door, although neither barred nor latched, would also constitute a breaking. For it is impossible, upon any intelligible principles, to distinguish between the degree of force used to raise a trap-door, and that sufficient to open the ordinary door of a dwelling-house."

The crime of burglary has been extended by statute (see 12 Anne, st. 1, c. 7, and 7 & 8 Geo. 4, c. 27 and 29) to the case of an offender breaking *out*, but the extension is condemned by the commissioners.

2. Whether a house be a dwelling at the time of the commission of the offence, has been made to depend on sundry curious particulars; and in allusion to the doubt, whether using it for the mere purpose of lodging there at night, without living there in the day time, be sufficient, the commissioners pointedly remark on the singularity that the question, whether a man is to be protected in his house during the night, should depend on the question, how his house may be occupied during

¹ East's P. C., 487.

the day. In some of the cases, they add, the house was slept in, not by the owner, but by a person employed by him for a particular purpose, viz. for the protection of the goods; and it was held that, as neither the owner nor any of his family had slept there, the house could not be regarded as such a dwelling-house as could be made the subject of burglary.

The following are illustrations:

"In Davis's Case, East's P. C. 499, the prosecutor having taken possession of a house on a tenant leaving it, and having purchased the furniture, placed a servant in it, who slept there for three weeks, in order to take care of the furniture, the prosecutor not intending to reside or carry on business there, it was held that this was not the dwelling-house of the prosecutor, as *he* never intended to inhabit the house. In Thompson's Case, East's P. C. 498, the house, which was a new one, being the property of Mr. Holland, had been finished all but the painting and glazing, and a workman slept there by the authority of Mr. Holland for the *purpose* of protection, but no part of Mr. Holland's family had taken possession of it, and it was ruled not to be the dwelling-house of Mr. Holland."

3. The third difficulty is to ascertain what constitutes a house, or what buildings may be regarded as part of it; and this is connected with a fourth, namely, who is to be described as the householder. The commissioners have been at some pains to explain these distinctions. The purport of their explanation is that the term *dwelling-house*, since the 7 & 8 Geo. 4, c. 29, comprehends all parts of the building connected internally either by immediate communication or by covered and inclosed passages. Prior to that statute all within the curtilage were deemed parcel of it. Then comes the question of ownership or rather householdership, as where the building is divided into chambers, or otherwise occupied by several persons inhabiting separate parts; for to support an indictment it is requisite to describe the building as the dwelling-house of some definite person or persons.

If the owner takes in lodgers or lets off part, but still retains possession of a common outer door and entrance, it seems clear that the house still remains his dwelling-house. If there be no common outer door, as in the Inns of Court, each set of rooms is deemed the dwelling-house of the inhabitant. But a middle case might occur, as where the person

retaining possession of the outer door ceased to inhabit any portion of the building—whose dwelling-house would it be then?

Another excepted case is suggested by the commissioners.

“It may be observed that there is a case which may make it desirable to extend the limits of the law against burglary, viz., where the owner of a dwelling-house, part of which is let to a lodger, breaks into the chamber of the latter in the night-time with a felonious intention. As against a stranger the whole dwelling-house would be the house of the landlord, and if in the case of such an offence against his tenant the whole were still to be considered to be his (the landlord’s) dwelling-house, he would not be guilty of burglary by breaking into any part. This particular case may be provided for under the head of procedure, where a rule may be laid down that in every case of such severed occupation the chamber, or set of connected rooms occupied by the tenant, may be described as his dwelling-house.”

The prefatory remarks are closed by the following passage:

“In the arrangement of the rules respecting burglary in the Digest, we have adhered to the characteristics of the offence as contained in the existing law; treating the invasion of a dwelling-house in the night-time as the *corpus delicti*, and the circumstances of violence and ill-usage to inmates as aggravations. In conformity also with the present law we have considered house-breaking with its several aggravations as a separate and distinct offence from burglary. If, however, the object had been to re-construct the law upon this subject, instead of merely digesting it with reference to existing rules and definitions, we are aware that a far simpler and more convenient method of arrangement might have been applied. In the French law, and in most of the modern codes of Europe, breaking an inhabited house is treated as an aggravation of theft¹. This is an imperfect means of classification, for as the breaking may be attended with the commission or intention to commit other offences, we see no reason why it should be considered as an aggravation of theft alone. The proper course, as it appears to us, would be to consider breaking a

¹ Code Penal, Art. 381. See also the Bavarian Code, Art. 221. Prussian Code, Art. 1163.

dwelling-house as in all cases the simple offence ; and then to classify the circumstances of stealing or committing any other offence therein, of night-time, and of alarm or injury to inmates, as so many aggravations, to each of which, when added to the crime of house-breaking, an appropriate place in the scale of punishments should be assigned. We apprehend that an arrangement of the law upon this principle would obviate many of the most embarrassing difficulties by which the subject is at present attended."

We do not well see how mere house-breaking can be regarded as the simple offence, for, divested of all the circumstances above enumerated, it partakes more of the nature of a trespass than a crime. The commissioners probably mean house-breaking with a felonious intent of some sort.

We shall quote the articles of the proposed Digest as they stand, for the purpose of enabling our readers to judge how far the existing sources of embarrassment would be removed by them.

ART. 1.

"Whosoever shall commit the crime of burglary shall incur the penalties of the class."

ART. 2.

"It is essential to the crime of burglary :—

"1st. That an entry be made into a dwelling-house of another, or some inner part of a dwelling-house of another, by the means or in the manner hereinafter defined.

"2ndly. That such entry be made, either with intent to commit some felony in such dwelling-house, or inner part of a dwelling-house, or that the offender, having made such entry, should commit some felony in such dwelling-house, or inner part of a dwelling-house.

"3rdly. That such entry be made, and such felony, where the commission of a felony is essential to the offence, be committed in the night time, as hereinafter defined."

The principal alteration effected by this article is contained in the second proposition, which makes the actual commission of a felony sufficient, whatever the original intent. This alteration is thus justified in a note:

"It has been held repeatedly, that if an indictment charge a burglary with intent to commit a felony, it will be supported by evidence of a felony actually committed, *Locosts and Villar's Case*, *Kelyng*, 30 ; 1 *Hale's*, P. C. 560 ; and consequently the report of the above

judgment of Mr. Justice Buller states this point too largely according to the ancient definition of the offence, which considers the *corpus delicti* complete upon a breaking and entering with a felonious intent. But many nice questions have arisen, and may arise, in consequence of resting the substance of the offence altogether upon the intent. It is obvious that a man may break a house with intent to commit a trespass, and afterwards may commit a felony not contemplated by him at the time of the breaking, or he may break with intent to commit a felony of one kind, as a rape, and may afterwards commit another kind of felony, as a theft. If, in such cases, the indictment stated the breaking to be with intent to commit the felony actually committed, the offender must be acquitted. But were the offence defined in the alternative, as suggested by Mr. Justice Buller in *Vandercomb and Abbot's Case* (though inaccurately according to the ordinary definitions) no difficulty of this kind could arise, as the indictment must then always charge either the intent or the actual commission of a felony according to the fact, and the proof of the former could not support the latter, and vice versa. For this reason, though a definition resting wholly upon the intent has the advantage of simplicity, and is perhaps the proper statement of the existing law, we think that it would be more convenient, upon the whole, to adopt the alternative definition."

The advantages will be doubted, and it strikes us that it would be better to convict a man of the felony actually committed, than to add it to a mere trespass for the purpose of convicting him of burglary. Wherever the offence really amounts to burglary, it might be reached by the existing law. The next ten articles relate to the entry.

ART. 3.

"An entry, so far as regards the means or manner of effecting it, shall be sufficient to constitute burglary, if it be effected by any of the means or in the manner hereinafter specified.

ART. 4.

"1st. If it be effected by means of any force used to break, displace, or open any part of the walls, roof, ceiling or floor of a dwelling-house, or any door, window, or other impediment opposed to entrance into a dwelling-house; and, as regards an entry into the inner part of a dwelling-house, if it be effected by means of any force used to break, displace, or open any part of the walls, partitions, ceiling, or floor of such inner part, or any door or other impediment opposed to entrance into such inner part.

ART. 5.

"2dly. If it be effected by means of any violence or threat of violence, either to the person or property of another, or by any other means of intimidation, direct or indirect.

ART. 6.

"3dly. If it be effected by means of any stratagem, trick, or device, fraudulently practised for the purpose of obtaining admission, or by collusion or conspiracy with any other person unlawfully affording or facilitating such entry.

ART. 7.

"4thly. If a party enter upon admission fraudulently given by a servant or other inmate.

ART. 8.

"5thly. If a party enter into the chimney of a dwelling-house of another, although no room or apartment of such dwelling-house be entered.

ART. 9.

"Where an entry is effected upon admission fraudulently given by a servant or other inmate, such entry, so far as regards the fact of entry, shall constitute burglary as well in the servant or inmate as in the party so admitted.

ART. 10.

"As regards the act of entry, the partial entry of any offender into a dwelling-house, or the inner part of a dwelling-house, or the introduction of any engine or instrument, or any part of any engine or instrument, into a dwelling-house, or the inner part of a dwelling-house, or the discharge of any missile into a dwelling-house, or the inner part of a dwelling house, shall be deemed to be an entry sufficient to constitute burglary, provided such partial entry by such offender be made, or such engine or instrument, or part thereof, be introduced, or such missile be discharged with intent to commit a felony in such dwelling-house, or inner part of a dwelling-house.

ART. 11.

"An entry into a dwelling-house, or any inner part of a dwelling-house, by any person having authority to enter therein, shall not be deemed to be an entry sufficient to constitute burglary, although he enter with intent to commit a felony, or having entered, commit a felony therein.

ART. 12.

"An entry by an inmate of a dwelling-house into any inner part thereof, and not made by virtue of any authority, trust or employment, is a sufficient entry into such inner part to constitute burglary."

The words *by means of any force* in the fourth article leave

open the doubts suggested in the prefatory remarks as to the degree of force required to constitute the crime. For example, is the raising of a heavy trap-door an entry by force?

Under Art. 10 it may be made a question whether shooting at a man through the window of his house, without the least intention of forcing an entry, is a burglary. The 12th Article is also worded in such a manner as to lead to confusion; for an argument might be raised whether Courvoisier would not have been guilty of a burglary by virtue of it. An illustrative case is to be found in Hale:

"The servant lies in one part of the house, the master in another, and the stair-foot door of the master's chamber is latched; the servant came in the night and unlatched the stair-foot door, and went up into his master's room with a hatchet intending to kill him and wounded him dangerously, but the master escaped. Upon this special matter found at the Winchester assizes, by the advice of the greater number of the judges, *exceptis paucis*, it was adjudged felony, and the offender was executed.—1 Hale's P. C. 555."

Surely something must depend on the fact whether the duty of the servant or inmate does or does not give him general access to the part of the building in question.

The next seven articles declare what is to be deemed a dwelling-house:

ART. 13.

"A dwelling-house consists of any fixed and permanent building which at the time of the offence had been or was used, and was intended to be used, either continuously or at intervals, for the purpose of lodging or dwelling therein by night.

ART. 14.

The motive or object for using such building for the purpose in the last preceding Article mentioned shall not be deemed to be material to the offence.

ART. 15.

"And such building shall be deemed to be a dwelling-house, although it be not inhabited by living therein during any part of the day.

ART. 16.

"The mere casual occupation of any such building, without the consent or licence of the owner or occupier thereof that such building should be used either continuously or at intervals for the purpose of dwelling or lodging therein by night, shall not constitute such building a dwelling-house.

ART. 17.

"The whole of any fixed and permanent building, and the whole of any portion of any fixed and permanent building, the parts of which communicate either immediately or by means of any covered and inclosed passage, and any part of which has been or is used, and is intended to be used as mentioned in Article 13, shall be deemed to be a dwelling-house.

ART. 18.

"Provided that no building, although it be within the same curtilage with the dwelling-house, and be occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other.

ART. 19.

"An inner part of a dwelling-house consists in any room, chamber, or compartment, being parcel of a dwelling-house as above defined; but no cupboard, press, locker, chest, or other receptacle or repository, whether attached to the freehold or otherwise, shall be deemed to be an inner part of a dwelling-house as regards the offence of burglary."

The seventeenth article is not well expressed, though the meaning may be discerned.

The twentieth article lays down rules for ascertaining the ownership :

ART. 20.

"The ownership of a dwelling-house shall be ascertained by the following rules, in respect of the mode of occupation :—

"1. Where such building or portion of a building, as is mentioned in Article 17, shall be in the occupation of one person, such building or portion shall be deemed to be his dwelling-house, whether he dwell therein himself, or whether the same be inhabited by any servant, agent, or other person whatsoever, by his authority or licence.

"2. Where such building or portion of a building, as is mentioned in Article 17, shall be in the joint occupation of several persons, such building or portion shall be deemed to be the dwelling house of such persons, whether they or any of them shall dwell therein, or whether the same be inhabited by any servant, agent, or other person whatsoever, by the authority or licence of them or any of them.

"3. Where such building or portion of a building, as is mentioned in Article 17, shall be occupied as to several parts by several persons, then in case such parts shall have an outer-door and entrance in

common, which shall be in the occupation of any person inhabiting any of those parts, the dwelling-house shall be deemed to be the dwelling-house of that person. *And in case such outer-door and entrance in common be not so occupied by any such inhabitant,* or in case there be no such outer-door and entrance in common, each of the rooms or connected sets of rooms so severally inhabited shall be deemed to be the dwelling-house of the person so inhabiting the same. And in case two or more of such severally occupied parts shall have an outer door and entrance in common, but other such parts shall have separate entrances only, then if such outer-door and entrance in common be occupied by any inhabitant of any of those parts having such entrance in common such two or more parts shall be deemed to be the dwelling-house of that inhabitant; and any other part or parts so severally inhabited shall be deemed to be the dwelling-house or several dwelling-houses of the person or persons so inhabiting the same."

The words in italics remove the difficulty we suggested, and supposing the article to be in force, we cannot conceive a case in which an offender could escape for want of an owner.

The remaining articles are :

ART. 21.

"So far as the same is essential to the offence of burglary, the night shall be considered to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day.

ART. 22.

"Whosoever shall burglariously enter into any dwelling-house, or any inner part of a dwelling-house, and shall assault with intent to murder any person being therein, or shall stab, cut, wound, beat, or strike any such person, shall suffer death.

ART. 23.

"Whosoever shall by any other means than those, or in any other manner than such as is hereinbefore defined, unlawfully enter into a dwelling-house, or the inner part of a dwelling-house of another, by night, with intent to commit some felony therein, or having so unlawfully entered into a dwelling-house or the inner part of a dwelling-house of another, shall, by night, commit any felony therein, shall incur the penalties of the class.

ART. 24.

"Any entry into a church, chapel, dwelling-house, shop, warehouse, or counting-house, which shall be effected by any of the means specified in Article 4, shall be deemed to be a breaking thereof respectively, in respect of any provision which makes the breaking thereof criminal."

Offences against the Executive Power form the subject of the Second Section. These are described as naturally distinguishable:

“First. As omissions to discharge legal duties.

“Secondly. Direct obstructions of the executive power.

“Thirdly. Offences tending indirectly to obstruct the executive power.

“Fourthly. Abuses of the executive power.”

It is hardly necessary to follow the Commissioners very closely through their general remarks on these offences, it being self-evident that “for carrying into effect the scheme of the constitution, and in order to the due administration of the laws,” it is necessary to provide for the selection of officers duly qualified, and compel them to perform their duty. Few, again, will require proof of the proposition that the dignity, patronage, and emolument which usually appertain to the higher executive offices, are generally found in practice to supersede the necessity for coercive laws to compel individuals to undertake them. At least, we are credibly informed that the *nolo episcopari* of Bishops, and the coy reluctance of Speakers, are now nothing more than playful pieces of coquetry; and the commands of his royal mistress have hitherto proved sufficient to keep Lord Melbourne in place without the assistance of an act of parliament. Still there are offices (as constable, overseer, &c. &c.) which reasonable people may regard as disagreeable, and it is therefore quite right that there should be a law for punishing such as decline or neglect to take their fair share of the burthens of society.

Nor is much instruction to be derived from the Commissioners’ observations on the necessity of prohibiting certain breaches of duty or offences particularly as well as generally. Indeed, we are not quite sure that we understand the purport of some of them. For example:

“Offences constituted on grounds of policy *peculiar* to any particular branch of the executive power, or to any other public institution or law, do not admit of any very general definitions. As these do not constitute direct violations, or even any immediate attempts to violate the law, but rest in *tendency*, they usually require to be specifically described. There are, however, some instances of offences, properly con-

stituted such by reason of their *tendency* to produce some violation of the law or evil consequence, but which cannot be otherwise than specifically described. Thus the advertising a reward for stolen goods is an act not amounting directly to an obstruction of the course of criminal justice, but tending incidentally to that consequence, and which ought therefore to be specifically described. A general prohibition against the doing of any act *tending* to obstruct the due action of the executive power, or the due course of justice, neither specifying any actual violation of any public right, nor any particular act or means intended to be made criminal, would be far too vague and indefinite to effect the legitimate objects of the criminal law."

We concur in the concluding proposition, but it is very slightly connected with the first. There is also a want of logical arrangement in the paragraphs which precede the remarks on offences against the administration of justice, and some topics are produced and re-produced in a manner which might induce a supposition that two or more of the commissioners, not being able to agree as to the best mode of expression, had compounded their difference by each inserting his own statement on the point.

Bribery, too, (which follows) is rather inartificially introduced, though its comprehensiveness affords a sufficient reason for not considering it under either of the subsequent divisions of judges, jurors, witnesses, &c. &c. The main object of the paragraph relating to it is to show that the definitions of Coke and Hawkins, who seem to consider a tampering with the administration of justice essential to the offence, are insufficient and irreconcilable with the modern decisions, in one of which (Vaughan's case) it was held to be bribery at common law to promise money to a cabinet minister as a consideration for an office in the colonies. The offence, it is added, by the English law, corresponds very nearly with the crime described in the *Code Penal* under the title, *De la Corruption des Functionaires Publics*.

In Blackstone's Commentaries it is said, "In judges, especially the superior ones, bribery hath always been looked upon as so heinous an offence, that Chief Justice Thorpe was hanged for it in the reign of Edward III." The Commissioners suggest that this must be a mistake, bribery never having been capi-

tally punishable by the laws of England; but with all due deference to them, this affords no conclusive argument, and hardly a strong presumption against the accuracy of the statement. Another of their arguments is, that Blackstone must be wrong, because the corruption of the judges for centuries after Thorpe's time was notorious and unquestionable, as if it were thereby legalized, or as if a penal law might not be suddenly revived to gratify the caprice of a sovereign, or strike down an offender more flagrant than the rest. Besides, there is no evidence that the judges were so very corrupt, though they shared, no doubt, in the vices of the times; and we rather think the commissioners have fallen into the common error of confounding the practice of taking presents from both parties (the *etrennes* of the French judges) with bribery,—a very bad practice, no doubt, but clearly distinguishable.

Offences against the Administration of Justice are considered as they concern:

I. Judges and other judicial officers.

II. Jurors.

III. Witnesses.

IV. Counsel, &c.

V. Ministerial officers.

VI. Obstructions, and other offences committed by private persons.

VII. Offences contrary to legal policy, and indirectly tending to obstruct the course of justice.

VIII. Abuses of authority.

1. *Judges and other Judicial Officers*.—Under this head they content themselves with quoting the oath taken by the judges, and Barrington's observations on a clause in it.

“ Mr. Barrington, in his observations on the words of the oath, ‘and ye give none advice or counsel to no man, great nor small, in no case where the king is party,’ remarks (p. 262) as follows:—‘ I suspect that this should be where the king is *not a party*; as, by the preceding part of the statute, the judges are to give their advice to the king when he shall have occasion for it; and which, in certain cases, they still continue to do.’ The meaning, however, seems to be that, where the king is party, no advice be given to any other.

This seems to⁴ be quite clear from the statute 20 Edw. III. c. 1, which, reciting the former commands to the justices, has the following clause:—‘ And that they shall give no counsel to great man or small, in case where we be party, or which do or may touch us in any point.’

“ Oppression and partiality in judges and other judicial officers are punishable at common law as crimes (to use the language of Mr. Justice Blackstone) of deep malignity.

“ Whilst corruption in the exercise of a judicial office is by the common law regarded as a high misdemeanor, it is one which, in this country, as regards the higher courts, may be said to exist in theory only, so exceedingly rare are the instances in modern times in which that high authority has been abused for unlawful purposes.”

2. *Jurors*.—The liability of jurors for wrong verdicts has tacitly ceased, since, instead of delivering their verdict upon what they know of their own knowledge, they have gradually become bound to attend exclusively to the proofs formally brought before them. The object of an attainr was to punish, not an erroneous conclusion, but a wilful misstatement, and the commissioners consequently see no necessity for reviving it. They deem it enough to punish the more direct violations of duty, such as taking bribes or using illicit means to serve. They also hold that a grand jurymen should be liable to punishment for disclosing evidence to an accused party; though the old law, which made him an accessory for so doing, went too far.

3. *Perjury*.—This branch of law appears to be in a most unsatisfactory state. At common law, perjury is a false assertion upon oath, in a judicial proceeding, regarding some material fact. The legislators of Queen Elizabeth’s time, deeming the common law prohibition insufficient, prohibit it by express enactment, and provide that any person procuring another to commit perjury in any matter or cause whatsoever in certain courts, shall forfeit the sum of forty pounds; or if he is not worth that sum, be imprisoned for half a year, and stand in the pillory for an hour; an enactment, which throws considerable light upon the value of money at the time. The person committing perjury is mulcted in just half the sum (20*l.*) which the suborner is to pay. This statute, as the

commissioners observe, must have had the effect of lightening the punishment and increasing the chances of escape, if the common law had been superseded by it; the maximum of fine and imprisonment (before indefinite) being thereby fixed, and the jurisdictions specified. But it has become practically obsolete during the last century, in consequence of the greater facility of the proceeding at common law, and they suggest the propriety of getting rid of it altogether. Some other statutory enactments do not appear to have been much more efficacious.

“ For instance, by the 6th section of the statute 13th of King Geo. III. c. 63, for establishing certain regulations for the better managing of the affairs of the East India Company, it is declared that if any person taking the elector's oath required by that act to be taken before voting for directors at general courts, shall *thereby* commit wilful perjury, he shall be liable to the penalties of the statute 5th of Queen Elizabeth, c. 9, and the 2d of King George II. c. 25. This statute, therefore, does not declare that the false swearing which it is meant to punish shall be perjury, but that if any person falsely taking the oath prescribed by the statute shall *thereby* be guilty of perjury, he shall be punished. But it is impossible that any person by falsely taking that oath can be guilty of *legal* perjury, as it is not taken in a judicial proceeding; and consequently, unless the word can in this particular case be construed to mean perjury in a *popular* sense, it might reasonably be doubted whether an indictment for perjury could be maintained upon this or any other of the numerous statutes in which the same form has been adopted. Again, in other statutes, by the careless use of general words, cases have been included which it never could have been the intention of the legislature to constitute crimes of this class, and which it would be obviously absurd to treat as perjury. Thus the statute of King George I. c. 18, for regulating elections within the city of London, declares that ‘ if any person shall wilfully, falsely, and corruptly take the oaths set forth and appointed by that act, or shall corruptly suborn any other person to take the said oaths, he shall incur such penalties, forfeitures, and disabilities, as persons convicted of perjury at common law.’ This clause was intended to apply to the oaths of liverymen

and electors at wardmotes in the city of London; but it is clear that the words comprehend the oaths of allegiance and supremacy, which are also specifically prescribed by the act. These instances of inconsistency have been selected at random from the statute book, and many others of the same kind might be adduced to evince the want of caution which has been displayed in framing clauses of this description. The great objection, however, to all these clauses is, that they confound the aggravated offence of judicial perjury with the inferior crime of false swearing, and place in the same penal predicament the guilt of wilful false swearing in a court, by which not only the administration of justice is insulted, but the life and property of others may be unjustly sacrificed, and that of swearing falsely to some fact relating to fiscal regulations or the registry of a deed. It appears to us that the object of the law may be much more effectually attained by a general clause, such as will be found in the digest, making it criminal in any person lawfully required by any competent authority to declare the truth upon his oath in any proceeding not judicial, wilfully to state a falsehood; and we propose to place this offence in a lower degree than judicial perjury in the classification of punishments. If this suggestion should be adopted by the legislature, all clauses in statutes constituting false swearing perjury, and also those which impose the penalties of perjury upon certain instances of false swearing, might be repealed, and thus a desirable uniformity in the law upon this important subject, and a proper distinction between two offences of very different degrees of criminality, would be effected."

Here a dilemma presents itself. Is false swearing to be considered as the substance of the offence in all cases, and its occurrence in a judicial proceeding as an aggravation? Or is the offence of giving false testimony on oath to be regarded as a totally distinct offence from false swearing? The first is stated to be the more logical mode of arrangement, and it has been adopted in most of the modern codes; but the commissioners decide for the last on account of its agreeing better with the existing law of England.

They quote one passage from the Report of the Indian Law Commissioners as to the propriety of putting the offence of

fabricating false evidence (as by putting stolen property in another's trunk) on the same footing as perjury, and another on the fitness of distinguishing between the different classes of false witnesses,—between him who swears away his neighbour's life, and him who stretches his conscience to give a good character to a boy accused of a petty theft.

Towards the commencement of their observations they have also called attention to the inconvenience of the rule requiring two witnesses, and the embarrassing particularity demanded in indictments for perjury. The statute 23 Geo. II. c. 11, provides that it shall be sufficient to set out the substance of the offence; and eminent judges have lamented that the provision was not more attended to; but, as the commissioners suggest, the setting out of substance is so delicate a matter that it is no matter of surprise to find practitioners perseveringly evading the risk.

4. *Offences by Counsel, &c.*—This is a topic of some interest to the bar, few of whom are aware of their liabilities. By the 3d Edw. I. it is provided:

“ If any serjeant pleader, or other, do any manner of deceit or collusion in the king's court, or consent unto it in deceit of the court, or to beguile the court, or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man; and if he be no pleader, he shall be imprisoned in like manner by the space of a year and a day at least; and if the trespass require greater punishment, it shall be at the king's pleasure.”

This provision, made more than five centuries ago, is the only one which expressly subjects a barrister to punishment, and the commissioners intimate a strong opinion against all provisions of the sort. We agree with them that it is hardly possible to impose specific checks or restraints on misconduct, without injuriously controlling the freedom of speech and infringing other privileges of the bar; for how is it to be ascertained to what extent counsel are borne out by their instructions, without instituting a scrutiny utterly destructive of professional confidence? We would therefore leave dishonourable practitioners, as now, to the tacit disapprobation of their brethren and the occasional censure of the bench, who seldom fail to mark their sense of any trick or deception put upon them. We

have seen Lord Tenterden require a document coming from a suspicious quarter, to be read aloud by the officer of the court, though under ordinary circumstances a bare statement of the substance would have sufficed.

A curious passage on the propriety of punishing false pleading, as well as false testimony, occurs in the Indian Law Commissioners' Report :

" We think this the proper place to notice an offence which bears a close affinity to that of giving false evidence, and which we leave for the present unpunished, only on account of the defective state of the existing law of procedure. We mean the crime of deliberately and knowingly asserting falsehoods in pleading. Our opinions on this subject may startle persons accustomed to that boundless license which the English law allows to mendacity in suitors. On what principle that license is allowed we must confess ourselves unable to discover. A. lends Z. money; Z. repays it; A. brings an action against Z. for the money, and affirms in his declaration that he lent the money, and has never been repaid. On the trial, A.'s receipt is produced. It is not doubted. A. himself cannot deny that he asserted a falsehood in his declaration. Ought A. to enjoy impunity? Again:—Z. brings an action against A. for a debt which is really due. A.'s plea is a positive averment that he owes Z. nothing. The case comes to trial; and it is proved by overwhelming evidence that the debt is a just debt. A. does not even attempt a defence. Ought A. in this case to enjoy impunity? If, in either of the cases which we have stated, A. were to suborn witnesses to support the lie which he has put on the pleadings, every one of these witnesses, as well as A. himself, would be liable to severe punishment. But false evidence in the vast majority of cases springs out of false pleading, and would be almost entirely banished from the courts if false pleading could be prevented. It appears to us that all the marks which indicate that an act is a proper subject for legal punishment meet in the act of false pleading. That false pleading always does some harm is plain. Even when it is not followed up by false evidence, it always delays justice. That false pleading produces any compensating good to atone for this harm, has never, as far as we know, been even alleged. That false pleading will be more common if it is unpunished than if it is punished, appears as certain as that rape, theft, embezzlement, would, if unpunished, be more common than they are now. It is evident, also, that there will be no more difficulty in trying a charge of false pleading than in trying a charge of false evidence. The fact that a statement has been made in pleading will generally be more clearly

proved than the fact that a statement has been made in evidence. The falsehood of a statement made in pleading will be proved in exactly the same manner in which the falsehood of a statement made in evidence is proved. Whether the accused person knew that he was pleading falsely, the courts will determine on the same evidence on which they now determine whether a witness knew that he was giving false testimony.

“ We consider a law for punishing false pleading as indispensably necessary to the expeditious and satisfactory administration of justice, and we trust that the passing of such a law will speedily follow the appearance of the code of procedure. We do not, as we have stated, at present propose such a law, because, while the system of pleading remains unaltered in the courts of this country, and particularly in the courts established by royal charter, it will be difficult, or to speak more properly, impossible to enforce such a law. We have, therefore, gone no further than to provide a punishment for the frivolous and vexatious instituting of civil suits, a practice which, even while the existing systems of procedure remain unaltered, may, without any inconvenience, be made an offence. The law on the subject of false evidence will, as it appears to us, render unnecessary any law for punishing the frivolous and vexatious preferring of criminal charges.”

These are the observations of a clever man, superficially acquainted with courts of justice and led astray by imperfect analogies. Pleading is a mixed allegation of law and fact. False testimony is not. The writer loses sight of this distinction ; or he would scarcely have said that there will be no more difficulty in trying a charge of false pleading than of trying a charge of false evidence. How, again, is it possible to say whether a man thought his own claim or defence just or not ? We ourselves have repeatedly seen a case break down from unforeseen causes,—as the absence, embarrassment, or contradiction of a witness, on whom both party and counsel had implicitly relied.

5. *Offences by Ministerial Officers.*—Under this head the principal offences are aiding or permitting prisoners to escape, and the remarks are not confined, as the title of the section would imply, to gaolers and officers of justice. The guilt of the assisting party is made by the law of England to depend in a great measure on the guilt of the prisoner; and the commissioners do not object to this criterion ; but they see no

reason for awarding a slighter punishment to him who assists a person confined on suspicion than to him who assists a convict. The distinction has received a partial sanction, and though it must be admitted that the law is equally defied and obstructed in both cases, it is impossible to help regarding one with more indulgence than the other.

Before the 1 Ed. II., breaking prison was a capital offence, without reference to the original cause of imprisonment. By that statute "our lord the king willeth and commandeth that none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise."

The pregnant brevity and precision of this enactment will strike every reader curious about style.

The commissioners think the alteration insufficient, and conceive that the only fitting course to pursue with one charged with a capital offence who escapes previously to trial, is to try him first on the original charge and then (in case of his acquittal) for the escape. The second trial under such circumstances, however, would run counter to the feelings of society.

6. *Obstructions and Offences by Private Persons.*—"A private person may offend against this branch of the executive power, either in not performing a duty cast upon him, or by resistance to officers in the execution of their duty, or in protecting offenders by affording the means of flight or concealment, or rendering other such aid or assistance, or by simply omitting to reveal his knowledge of offences either actually committed or merely meditated.

"The first and second of these classes of offences have already been adverted to."

It required a long time after sanctuaries were abolished, to eradicate the popular notions concerning them, and it was consequently found necessary to provide by express enactments against resistance to process in the Whitefriars, the Savoy, the Minories, and other districts. The commissioners suggest that these enactments have now become nugatory, and may be repealed.

Their next topic is *misprision*, as to which they think the

law open to grave objection. One guilty of aiding an offender to escape by concealment or otherwise, is punishable as an accessory after the fact, but cannot be convicted of the offence till after the conviction of the principal. It also seems doubtful whether an accessory after the fact can exist, except in respect of offences of an inferior degree to felony. The commissioners think that assistance of this kind should be held to constitute a distinct offence, and that the liability of the offender to punishment should not be made dependent either on the guilt of the principal or the knowledge the party aiding might have of it—the sole question in each instance to be, whether such party intended to obstruct the execution of the law.

By the common law, the bare knowledge and concealment (*i. e.* by not revealing it) of treason committed or contemplated, was treason. The statute 1 & 2 Philip & Mary reduces the offence to misprision. The like concealment of a felony is punishable (by 3 Edw. I. c. 9) in the case of a public officer, by imprisonment for a year and a day—of a common person, by imprisonment for a less, but undefined period: in both, by fine and ransom, at the king's pleasure. The commissioners think that, (except in the case of crimes contemplated, or very heinous offences committed,) there is no such imperative necessity for enforcing disclosures by severe penalties.

“ To require every one, without distinction as to the nature and degree of the offence, to become an accuser, would be productive of inconvenience in exposing numbers to penal prosecutions, multiplying criminal charges, and engendering private dissension. It may sometimes be more convenient that offences should be passed over, than that all should indiscriminately be made the subject of prosecution; and a law would be considered to be harsh and impolitic, if not unjust, which compelled every party injured by a criminal act, and, still more so, to compel every one who happened to know that another had been so injured, to make a public disclosure of the circumstances. Here, therefore, there is reason for limiting the law against mere misprisions to the concealment of such crimes as are of an aggravated complexion, on grounds which do not extend to *acts* of concealment, or other positive obstructions of the course of criminal justice; the latter, as

amounting to actual violations of public right, cannot but be regarded as criminal, whatsoever be the degree of the original offence."

7. *Indirect Obstructions of the Course of Justice.*—Under this head the commissioners content themselves with mentioning the compounding of felonies and the publication of *ex parte* proceedings in courts of justice.

8. *Abuses of Judicial Authority.*—Numerous penal enactments are still to be found in the statute book against abuses of this kind by lords of franchises and others entitled to peculiar jurisdictions. The altered state of society has rendered almost all of them useless, and it is thought that the law affords sufficient protection against magistrates and inferior judges; for, as regards the bench of Westminster Hall, there has never of late years existed so much as a suspicion of any corrupt or tyrannical exertion of authority.

We now come to *Barretry, Maintenance, and Champerty.*

The offence of *Common Barretry* consists of a series of acts tending to the disturbance of the peace—moving or exciting suits, getting fraudulent or forcible possession of lands in controversy, sowing discord by false reports and calumnies, &c. &c. The commissioners object that a law warranting a charge of so indefinite and doubtful character tends to promote the very evil it is meant to exclude; and, with every wish to restrain needy practitioners, they recommend its abolition.

Maintenance consists in affording aid to litigants in the shape of money or (according to some authorities) of advice; for though it is not illegal to tell a friend what course to pursue, or what attorney to select, "it is said that a man of great power, not learned in the law, may be guilty of maintenance by telling another, who asks his advice, that he has a good title." It might have been necessary to prohibit acts of this kind in feudal times, when each great lord lived surrounded by a band of feudal retainers, and both judges and juries were in the habit of considering the position and connections of the party as well as the merits of the case. But such a law can serve no other purpose now, than to restrain persons actuated by charitable or friendly motives from rendering as-

sistance where it is most needed ; for how a poor man is to procure an adjudication of a claim unless some one commits maintenance, it passes our comprehension to conceive.

Neither do we see much good in forbidding *Champerty*, i. e. a bargain made with a party for a share of the subject-matter of the suit. It can no longer prejudice the course of justice, and many a just title may lie dormant and die out unless the claimant is enabled to promise his friend or attorney some compensation proportionate to the risk. At all events, it is obvious that the effect of the laws in question, supposing them to be enforced, would be diametrically the reverse of that which they were originally intended to produce. They were framed to restrain the rich and powerful : they would operate to the injury of the poor.

A Digest of the existing law on the several subjects above-mentioned follows ; but as most of them seldom occur in practice, and many are to be repealed, we see no necessity for copying it.

Forgery. The Prefatory Remarks on this topic commence with a description of the characteristics of the offence, and a short statement of the progress of the law.

“ In early times, when few transactions were conducted in writing, the offence was of rare occurrence, and attracted little of the attention of the legislature. As civilization proceeded, and a widely extended system of paper credit grew up, cases of forgery began to multiply to a most alarming extent, and an impolitic degree of severity was resorted to for the purpose of suppressing them. So many statutes were afterwards made that Sir W. Blackstone observes, ‘ I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived, wherein forgery, that tends to defraud, whether in the name of the real or fictitious person, is not made a capital crime.’¹ Since the publication of the Commentaries many other statutable provisions have been made applicable to particular cases ; but the punishment of death is now no longer inflicted for any forgery, having been finally abolished by an act of the 1st year of your majesty’s reign, which substituted transportation for life, or not less than seven years, or imprisonment not exceeding four nor less than two years, in lieu of it. The greater num-

¹ 4 Black. Com. 250.

ber of special forgeries is now, therefore, liable to this substituted punishment. There are many others variously punished, but in most cases more severely so than the common law offence."

The plan adopted in the formation of the Digest is thus described:

"We have, in the first place, proceeded to define the common law offence. The general definition of the offence is in substance that which is given by Sir W. Blackstone, which we have adopted, and which is recommended by its conciseness, accuracy, and generality. We have, however, for the sake of comparison, stated those of several other very eminent judges. We have also introduced various articles for the purpose of more particularly defining and explaining the nature and extent of the offence. Having thus disposed of the common law offence, we have next proceeded to deal with the statute law upon this subject. The statute book presents a mass of enactments made from time to time, inflicting a great variety of punishments on various modifications of the general crime. The great multitude of specific enactments applicable to various subject matters raises a question of some difficulty as to the course which ought to be taken with a view to digest these provisions. After defining the common law offence, the natural course would be to distinguish such instances of the offence as by reason of the greater degree of mischief likely to result, would require more exemplary punishment; and for this purpose instruments the subject of forgery would be classed in order, according to their greater or lesser degree of importance. The statute law of England concerning forgery has not, however, been constructed on any such principles; its provisions are in numerous instances too minute and particular to admit of general extension without an entire remodelling of this branch of the law."

They admit that the crime of forgery is capable of being defined and expressed better than it hitherto has been in English text books, in proof of which they refer to foreign codes, particularly the revised statutes of New York. But they have not thought themselves justified in recasting the law, but after much consideration, proceeded first to define the general rule of the common law, and then to arrange and

classify the statutory enactments. Another motive which influenced them in the adoption of this course, was the arbitrary and severe character of some special enactments, which could not well be included within such general provisions as they might have felt inclined to recommend. For example, the 11 Geo. IV. and 1 Wm. IV. c. 66, s. 12, renders it highly criminal for a man to have a banknote in his possession without lawful excuse, the proof lying on the accused :

“ This law inverts the general principle of criminal jurisprudence, that a man is presumed to be innocent till his guilt be proved. A man may, therefore, be dealt with as an offender, not because he is really guilty, but because from accident, or otherwise, he cannot prove his innocence,—death or accident having precluded him from explaining the real circumstances of the transaction. Offences of this nature require to be most specifically stated and defined, and they must retain their arbitrary character, being incapable of generalization, as they are not founded upon principle.”

The common law definition of forgery, strictly speaking, includes the uttering as well as the making of written instruments, but as the act of uttering is distinct from that of making, the commissioners have omitted it from the definition of forgery, and treated it as a separate crime.

We give a specimen of the Digest :

ART. 1.

“ Forgery consists in the false and fraudulent making of an instrument with intent to prejudice any public or private right.

ART. 2.

“ The term ‘ instrument ’ shall be deemed to comprehend any written instrument, and any character, figure, impression, device, or other visible mark of distinction (whether it be made to appear upon any material, or in the substance thereof), and also any type, die, seal, stamp, plate, or other instrument for making, upon any material whatsoever, any mark or impression used as a mean for authenticating the truth or genuineness of any fact or thing whatsoever.

ART. 3.

“ The term ‘ written,’ as used in the last preceding article, shall be deemed to apply, whether the words or figures of the instrument, or any of them, be expressed at length or abridged, and whether they be so expressed by means of writing, printing, or otherwise.

ART. 4.

"An instrument shall be deemed to be falsely made when it is not really the instrument or mean of authentication for which it is intended to be taken, but is fraudulently made with intent to obtain that credit which would be due to it if it were genuine.

ART. 5.

"A written instrument, or other thing, the subject of forgery, shall be deemed to be falsely made, where it is falsely made in any material part.

ART. 6.

"Any fraudulent alteration of a written instrument in any material part, whether it be by addition, diminution, erasure, transposition, or any combination of any of these acts, or any other device or means whatsoever, shall be deemed to be a false making of the written instrument so altered.

ART. 7.

"If several persons shall make distinct parts of, or shall otherwise contribute to the making of a false written instrument or other thing the subject of forgery, each of such persons shall be deemed to have falsely made such written instrument or other thing.

ART. 8.

"If any person, being deceived as to the contents of any written instrument, shall by reason of such deception be fraudulently induced to sign or otherwise execute the same, the party by whom he was so induced to sign or execute it shall be deemed to have falsely made it.

ART. 9.

"If a person fraudulently make or execute in his own name any written instrument which is false in respect of the date, or any other material part, it shall be deemed to be a false making of such instrument.

ART. 10.

"It shall be deemed to be a false making of a written instrument if the offender falsely make it in the name of any other person, real or supposed, although such name be the offender's own name.

ART. 11.

"No fraud in respect of a written instrument or other thing will constitute forgery, unless there be a false making of such instrument or other thing within the meaning of the preceding Articles."

Offences against the Public Peace. "The French code includes under the general term of Offences against the Public Peace, coining, some kinds of forgery, corruption and

abuses of authority by public officers, and inflammatory discourses and writings by ministers of religion, and also rebellion, and seditious and tumultuous meetings. We have thought it convenient to use the term for our present purpose in a more restricted sense, and to apply it, according to its literal and popular meaning, to those offences only which, by being committed by numbers of persons, or attended with actual and open violence, directly tend to endanger the public peace, distinguishing this class of offences from crimes against the state on the one hand, and from crimes against the persons and property of individuals on the other hand."

They consider the law on this subject highly defective. A riot, rout, or unlawful assembly relating to a private quarrel, or bearing reference to a private object, is a trespass or felony at the worst; but if the object or motive be public or general, the parties are guilty of treason, though probably never guilty of a disloyal thought or intention in their lives. Then comes the difficulty of distinguishing between private and public objects, and the conflict between ancient and modern authorities as to the proper test to be applied. In the time of Charles the Second, it was held that an assembling to destroy brothels was a levying war against his majesty; and the mob who, during the Sacheverel frenzy, proceeded to pull down meeting-houses were declared guilty of treason by the unanimous opinion of the Bench. Of late, the common sense of the community, which invariably though almost imperceptibly influences the courts, has rebelled against the doctrine; and doubts were entertained in high quarters whether the case against Frost was complete for want of more distinct evidence of a traitorous design. The commissioners observe:

"It has resulted, we apprehend, from the pressure of these objections in practice, as well as from the prevalence of more enlightened views of the objects of penal laws, that in recent times this doctrine has not been strictly applied in cases of tumultuous assemblies. On the various occasions of popular disturbances which have occurred during the present century, many instances have occurred of trials and convictions for riots and unlawful meetings, in which the character of the assemblies and the object of the offenders brought them, according to the authorities, within the law of high treason.

"We reserve the full discussion of this most important subject to the more appropriate head of Offences against the State; and we merely allude to it here in order to point out that the law of tumultuous assemblies and the law of high treason are, upon the existing system, entirely dependent upon each other. Where the law of high treason ends, the law of tumultuous assemblies begins; and if the limits of the former are restricted so as to exclude all constructive treasons (which we think ought to be the case), it is obvious that the boundaries of the latter must be proportionately extended. On this account we have thought it proper, on the present occasion, to give the law in the Digest nearly as we find it laid down by the most approved authorities; merely omitting the distinction between *private* and *public* enterprizes, in conformity with the modern practice and for the reasons we have above suggested. In that part of the Digest which will contain the law of treason we shall distinctly define those tumultuous assemblies which we think ought to be classified as offences against the sovereign or the state."

In the second place, they object to the technical distinctions between riots, routs, and unlawful assemblies.

"To constitute a *riot*, there must be a joint design which must be *executed*, or at least some act must be done in part execution of it: the character of a *rout* is complete, as soon as some act has been done *moving towards the execution* of the joint design; and it is an *unlawful assembly* where three or more persons meet together for any unlawful purpose, or *intending to execute* any purpose with force, and with such circumstances as tend to excite alarm, but do no act moving towards its execution. There is no doubt an obvious distinction between these three degrees of criminality; but the point of the offence in all is the unlawful assembly. The difference between a part execution of a design, and an act moving towards such execution is extremely subtle, and might often lead to difficulties in practice; and it seems to be a simpler and more intelligible principle of arrangement to consider the unlawful assembly as the groundwork of the offence, and the part execution of the joint design or the motion towards it as aggravations."

The present mode of classification is notwithstanding retained in the Digest.

In the third place, they see no reason for allowing a man to assemble and arm his friends for the defence of his dwelling-house, and denying him the same privilege for the protection of his person, personal property, or land—a distinction evidently founded on the aphorism that an Englishman's house is his castle. They do not say whether they would abolish or extend the privilege, but it strikes us that its abolition would be most in accordance with the present condition of society, which requires nobody but Justice to wear a sword.

In the fourth place, they trace the history and quote with commendation the leading provisions of the Riot Act, which they propose to retain. They also deem it expedient to continue the statutory provisions against the offence of riotously demolishing houses—still capital—on the ground of the probable danger to human life, but as no such danger can be reasonably anticipated from the pulling down of stables, out-houses, &c. (see 7 & 8 Geo. IV. c. 30,) they suggest that a milder punishment would suffice.

The principles of criminal law reform have been so fully discussed in former numbers, that we have purposely confined ourselves to giving the substance of this Report.

H.

LIFE OF LORD ERSKINE—(*concluded.*)

IN these elegant literary pursuits the ex-Chancellor contrived to solace his vacant hours—and would that all the dissipations, with which he sought to chase away ennui, had been equally tasteful and serene! His beautiful residence on the very summit of Hampstead Hill, above Caen Wood, was admirably adapted to every want, whether of literature or society. The extension, improvement, and decoration of such a spot, which commands a splendid prospect, had been the amusement of very many years, and though attended with considerable expense, had rendered it a delightful retirement. To this villa, shut out from the road between Hampstead and Highgate by evergreens of different descriptions, Lord Erskine gave the somewhat fantastic name of Evergreen Hall. Within an easy half-hour's drive from the west end of London, its host made it for a season the common centre, to which the brightest rays of Whiggery, both literary and fashionable, might converge. Of one of these festive gatherings Sir Samuel Romilly has given a graphic description, in which the indiscretion of Lord Erskine, and his humane, yet eccentric diversions, are set faithfully before us. He seems to have embraced in his comprehensive fondness for animals the most ungainly and least attaching objects of creation:

“ I dined to day at Lord Erskine's. It was what might be called a great opposition dinner: the party consisted of the Duke of Norfolk, Lord Grenville, Lord Grey, Lord Holland, Lord Ellenborough, Lord Lauderdale, Lord Henry Petty, Thomas Grenville, Tierney, Piggott, Adam, Edward Morris (Lord Erskine's son-in-law) and myself. This was the whole company, with the addition of one person; but that one the man most unfit to be invited to such a party that could have been found, if the man had been anxiously looked for. It was no other than Mr. Pinkney, the American minister: this at a time when the opposition are accused of favouring America to the injury of their own country, and when Erskine himself is charged with being particularly devoted to the Americans! These are topics which are every day insisted on with the utmost malevolence in all the ministerial newspapers, and

particularly in Cobbett. If, however, the most malignant enemies of Erskine had been present, they would have admitted that nothing could be more innocent than the conversation which passed. Politics were hardly mentioned, and Mr. Pinkney's presence evidently imposed a restraint upon every body. Among the light and trifling topics of conversation after dinner, it may be worth while to mention one, as it strongly characterises Lord Erskine. He has always expressed and felt a great sympathy for animals. He has talked for years of a bill he was to bring into parliament to prevent cruelty towards them. He has always had several favourite animals, to whom he has been much attached, and of whom all his acquaintance have a number of anecdotes to relate—a favourite dog, which he used to bring when he was at the bar to all his consultations: another favourite dog, which, at the time when he was Lord Chancellor, he himself rescued in the street from some boys, who were about to kill him under pretence of its being mad; a favourite goose, which followed him wherever he walked about his grounds; a favourite mac-kaw, and other dumb favourities without number. He told us now that he had got two favourite leeches. He had been blooded by them last autumn, when he had been taken dangerously ill at Portsmouth. They had saved his life, and he had brought them with him to town: had ever since kept them in a glass; had himself every day given them fresh water; and had formed a friendship with them. He said he was sure they both knew him, and were grateful to him. He had given them different names—Home and Cline, (the names of two celebrated surgeons,) their dispositions being quite different. After a good deal of conversation about them, he went himself, brought them out of his library, and placed them in their glass upon the table. It is impossible, however, without the vivacity, the tones, the details, and the gestures of Lord Erskine, to give an adequate idea of this singular scene."

When compelled to abandon the delightful retreat at Hampstead, and withdraw for retrenchment to a small mansion on his estate in Sussex, the humane lawyer found in his favourites fresh objects for solicitude, and new sources of amusement. Acting on the principle of the true citizen of the world, who

would not harm the most troublesome fly, as there was room enough for both, he wished to extend protection to all created beings, and patronized even a rookery, that object of agricultural aversion. To enforce his views, he wrote a little poem in the style of Dryden's *Fables*, but with far inferior power; and, though he would not publish the easy verse in which he inculcated his sound philosophy, he gave copies to his friends. The following short preface and introductory lines fully explain the design of this little fable in octo-syllabic measure, intituled :

“ THE FARMER'S VISION.

“ The following lines were occasioned by my having at the instance of my bailiff in Sussex complained to a neighbour of his rookery, the only one in that part of the country : but having been afterwards convinced of the utility of rooks, I countermanded my complaint, and wrote ‘ The Farmer's Vision.’

“ The lines are very incorrect and unfinished, being sketched only as a domestic amusement to inspire humane and moral feelings in a new generation of my family, and with that view were inscribed to my eldest grand-daughter, Frances Erskine, as the fair poetress of St. Leonard's Forest, who, though not then sixteen years of age, could have handled the subject much better herself. It is indeed so capable of being made interesting, that I would have prolonged the vision, and worked it up into a poem, but for an insuperable objection, viz., that I am not a poet ! It is not fit for publication, a few copies are only printed for friends who asked for them, as it was too long to make them in writing.

BUCHAN HILL, SUSSEX, December 25, 1818.

“ Old Esop taught vain man to look
In nature's much neglected book,
To birds and beasts by giving speech
For lessons out of common reach ;
And though 'tis said they speak no more,
(Once only too in days of yore,)
They whisper truths in reason's ear,
If human pride would stoop to hear—
Nay, often in loud clamours crave
The rights, which bounteous nature gave :
A flock of rooks, my story goes,
Of all our birds the most verbose,

Took their black flight to Buchan Hill,
On ¹Willard's oats to eat their fill :
His gun he fired, when off they flew,
With scattered rear of not a few,
Fainting from many a cruel wound,
And dropping lifeless on the ground.
But one bold rising on the wing
Thus seemed to speak—Rooks never sing—
' Before the Lord of this domain
Sure justice should not plead in vain ;
How can his vengeance thus be hurled
Against his favourite lower world.
A sentence he must blush to see,
Without a summons or a plea ;
E'en in his proudest, highest times
He ne'er had cognizance of crimes ;²
And shall he now with such blind fury,
In flat contempt of judge and jury,
Foul murder sanction in broad day
Not on the King's but God's highway !
Touch'd with the sharp but just appeal,
Well turn'd at least to make *me* feel,
Instant this solemn oath I took—
No hand shall rise against a rook !
Scarce had the solemn pledge been given,
When signal of approving heaven,
A form angelic seemed to fly
On meteor wing athwart the sky."

The doctrine of humanity to every thing indued with life, however low in the scale of creation, is enforced by the angel at great length, but in strains very unlike the seraph's in Milton. The kind-hearted nobleman has added a valuable note in prose, replete with gentle philosophy, though pushed to the verge of paradox.

" Nor could the soil its produce yield
Though Coke himself prepared the field,
But for the never ceasing round
In which both life and death are found,
But chief, when tilth is first begun
Earth meets the air and blessed sun,

¹ Lord Erskine's bailiff.

² The Lord Chancellor has no criminal jurisdiction.

Then numbers beyond numbering rise,
 Some skim the earth, some scour the skies,
 Th' astonished farmer toils in vain,
 Each hour destroys his ripening grain,
 But Providence beholds the scene,
 And other beings step between,
 Yet let not man presume to know
 Their course, nor dare to strike the blow.

"It may be necessary here to come under the poet's license, otherwise vermin of all descriptions, however manifestly destructive in our gardens, ought to be permitted to lay them waste. The economy of nature throughout the minuter gradations of animal life mocks all investigation; yet Providence must undoubtedly have intended that all created beings should be fed, as their instincts direct. Trees therefore of all kinds bear their fruits and seeds in a thousand times greater quantity, than are necessary for their reproduction, and which must obviously have been intended for animal subsistence. When they grow in a wild state, innumerable tribes of birds and insects take their allotted proportions without interference, and man is contented with what remains, whatever it may be, but in the resorts of luxury he will bear no partnership. The peaches and nectarines on his walls bring an hundred times what would come to his reach, if they grew in the desert, yet he will not spare one of them, but hangs his honeyed bottles on every branch, when wasps and other insects surround them, not indeed in their natural number, but multiplied by the allurements of human monopoly. In the same manner when men congregate in large cities, and amass greater wealth than is perhaps consistent with a wholesome state of society, thieves and robbers abound in proportion, and the judge at the Old Bailey, like the gardener in the orchard, has a duty imposed upon him to keep them down.

"Cowper in his 'Task' has given the rule for our conduct to the lower world in almost a word; and the latitude he allows to man's acknowledged dominion is surely amply sufficient:

"The sum is this: if man's convenience, health,
 Or safety interfere, his rights and claims
 Are paramount, and must extinguish theirs,
 Else they are all—the meanest things that are—
 As free to live, and to enjoy that life,
 As God was free to form them at the first,
 Who in his sovereign wisdom made them all.'

"The whole subject of humanity to animals is so beautifully and

strikingly illustrated in this admirable poem, that no parents ought to be satisfied, until their children have that part of it by heart.

“ For myself my opinion is, that we rarely succeed in a war of utter extermination against animals we proscribe; and, even if we could prevail, others more mischievous than those we destroy might multiply, perhaps, from their destruction. We ought, therefore, to be contented to destroy the individuals, or masses of them when they grievously offend, rather than carry on a systematic war against them for their total annihilation. It is thought by many well-informed persons that the destruction of weasels, and creatures of that description, for the preservation of the game, has increased the number of the field rat in many parts of England—an animal more dangerously destructive. It is extremely difficult besides, if not quite impossible, to subdue whole classes of innumerable, and scarcely visible, insects: witness the ineffectual attempts by lime, by soot, and by all that chemistry could bring into action, to overpower the turnip fly, that unrelenting enemy to every farmer. This little epicure feeds on its first leaf, which is soft and smooth, showing itself in a few days after sowing, but when the second, or rough, leaf appears their repast is over, when they either die or remove in search of other food. The fact is, that they often move from place to place, and are occasionally billeted upon us by nature upon their march, and we must provide for them the allotted rations under the common penalty of a distress.”

Scarcely inferior to the largeness of his sympathy is the eulogy which the author scatters in profuse measure, “ full to the brim and running over,” upon all his friends and acquaintance without distinction of politics.

“ The Farmer’s Vision (he informs us) was written immediately after the battle of Leipsic, whilst Europe was following up the advantage of that conflict, and the victory of Waterloo confirmed this prophetic vision. It cannot therefore be considered as flattery nor even partial regard to remark how greatly the skill and unwearied attention of the commander-in-chief of our army contributed to the glory of that memorable event; since, as great performers on music must have the finest and best toned instruments to draw out their extraordinary execution, so the most accomplished officers must have the highest disciplined troops to secure their genius in the tremendous crisis of such a battle. Such British troops the illustrious Wellington commanded, when, in a single day, he re-edified a world almost in ruins. I shall never therefore think that our national character for generosity and justice is wound up, until some public reward is conferred by parliament on the Duke of York,”

In this spirit of profuse commendation the noble author speaks of Coke of Norfolk as "the most enlightened agriculturist—the soundest politician—and one of the honestest and best men this country ever bred." And of Frederica, Duchess of York, "whose talents, manners, and distinguished accomplishments I should have been more desirous to record in unfading numbers, but no man can add a cubit to his stature, and I must therefore content myself in this note to express my affection, admiration, and respect."

However much his admirers may delight in this exhibition of generous sympathy—and, sooth to say, these little effusions of the heart are more marked by moral than intellectual excellence, evincing a kindness of spirit in their author which age could not blunt, nor adversity harden—the multitudes who revere his memory must regret that he did not devote more of his time and attention to legal studies, and, as he might be summoned, on any sudden change of ministry, to resume the weighty matters of the law, that he did not assiduously attend the judicial meetings of the Privy Council, and assist at the hearing of appeals in the House of Lords. By such proofs of professional diligence, Lord Redesdale was enabled, for more than twenty years after he had been driven from the woolsack, to do the state good service, and to strengthen his claim to respectful remembrance with posterity. That Lord Erskine should have declined a like irksome labour may excite, however, feelings more of sorrow than surprise. To fail where he has been expected to be more proficient than his rivals, must be mortifying in the extreme to a man of sensitive mind, and it is not to be expected that he should invite comparison, or expose himself, where escape is easy, to a proof of deficiency.

The ex-Chancellor made no secret of his inexperience in the mysteries of equity, compared with either Lord Eldon or Lord Redesdale, however superior he might be to either in those branches of the law with which he was more peculiarly conversant. To commit an error in some point of practice, and be gently corrected by his successor; to be ignorant of some case directly in opposition to his argument, and be set right by a more learned lord with a subdued air of triumph; to catch an arch smile in the countenance of some shrewd

critic below the bar, and hear or suspect the disparaging comment of some Tory peer, was a penance too great for his proud and sensitive spirit willingly to endure. He was not selfish enough to deny the merit of the Chancellor, whose laurels would not have troubled his repose, but he shrunk from the arduous task of competition, and, hopeless of victory, could not conquer in private his distaste to those reports of Ambler and Vesey, which he began to read too late in life thoroughly to master. So careless was he of acquiring even the common forms of the house, that Sir Samuel Romilly, a jealous competitor for the Chancellorship, should ever a vacancy occur, has recorded in his private diary an instance of Erskine's inefficiency :

" Lord Erskine told me, on Saturday, June, 1814, that he should certainly bring on my bills, which he has taken charge of, on this day. He had not, however, given any notice of his intention, or required that the lords should be summoned ; and, though he formerly presided in the House as Chancellor for above a year, he was ignorant till he learned from me with surprise and evident mortification, that a previous notice was, according to customary usage, necessary, before he could move the second reading of any bill."

The next year Sir Samuel Romilly discarded his ally : " March 15, 1815. I called this morning on Lord Grenville to endeavour to prevail on him to take the charge in the House of Lords of my bill for subjecting freehold estates to the payment of simple contract debts, for, if it continues this year, as it was the last, in the hands of Lord Erskine, who does not understand the subject, and is incapable of answering any objections that are made to it, there is no chance of its being carried."

This carelessness regarding legal forms and inaptitude to legal discussions strengthened each year the public impression, which the Whig ex-solicitor entertained in private life, that, if a Liberal ministry should recover their authority, the great seal could scarcely be again intrusted to the hands of one so indifferent : " with all his talents (and very great they undoubtedly are) his incapacity for the office was too forcibly and too generally felt for him to be again placed in it."

His disinclination to trouble himself with the judicial business of the House of Lords acquired additional vigour from the conclusion to which his brother peers had come, in deciding the case of the Banbury Peerage adversely to his feelings, judgment, and authority. In the investigation of that singular and important claim, one of the most interesting, that was ever submitted to the court of the highest judicature, and which is supposed to have wrought a total change in the law of legitimacy, Lord Erskine brought to the aid of the claimant, Lieutenant-Colonel Knollys, his personal friend, an argument which for its tone of high-minded reasoning, acute analysis of evidence, and beautiful diction, deserves to rank among the finest monuments of judicial ability. It was one of the last judgments the ex-Chancellor pronounced, and his best. However much we must dissent from his legal principles, and acquiesce in the adverse determination—well weighed and confirmed as it has been by recent authorities—the praise of consummate advocacy cannot be denied to his artful exposition of the petitioner's right to the peerage. That the reader may fully appreciate the excellence of the few specimens our space can allow, we shall give a short history of the case—a sort of rude portal to the well-wrought fabric of his eloquence.

William Knollys, first Lord Banbury, in December 1605, being then fifty-eight, married the Lady Elizabeth Howard, then little more than nineteen. In 1626, he was created Earl of Banbury, the patent of the earldom stating, “that his majesty intended to have made him first of the earls created at his coronation, but in consequence of his dangerous illness, had resolved to wait until a more convenient time, and therefore now gave him precedence over all earls subsequently created.” When parliament met for the first time after Lord Banbury's creation, in March 1628, the Committee of Privileges reported that the law was full and clear, that all peers are to be placed and ranked according to the antiquity of their creations, but also reported a message from the king, that his majesty desires this may pass for once (without prejudice), considering how old a man this lord is, *and childless*, so that he may enjoy it during his time. To this request a murmuring acquiescence was given. The year previous, 1627,

the Countess of Banbury had given birth to a son, Edward, and in 1731 had another son, Nicholas. Lord Banbury must have been eighty-four or eighty-five at the period of the birth of his second son, and died in May the following year, 1632, having left a will of earlier date unaltered, and not made any mention of a son in the codicil. An inquisition taken at Burford nine months afterwards, respecting the lands of which he died seised, found that the earl died without heirs male of his body. The Countess of Banbury married Edward Lord Vaux within five weeks of the earl's decease. In 1640 a bill was filed in Chancery by Edward Earl of Banbury, an infant, for the discovery of deeds and writings, against one Stevens, who claimed title under a conveyance for life, or lease for years, from Earl William, and stated that the plaintiff was not his son and heir. Five witnesses were examined to prove his birth at Earl William's mansion-house, and that the earl and countess lived lovingly and kindly together. Their depositions, on being tendered in evidence in support of the claim in February 1809, were, after referring to the opinions of the judges, rejected as inadmissible to prove the facts stated therein. A commission, in consequence of these depositions, was ordered by the Court of Wards, and the inquisition held under this writ found that Edward, now Earl of Banbury, is, and at the time of the earl's decease was, his son and next heir. In June 1641 the Countess of Banbury and her youngest son obtained a licence to travel. Edward Knollys, the eldest son of Lord Banbury, assumed the title, and was killed near Calais during his minority in 1646. Nicholas, then fifteen, immediately assumed the title.

When the peers assembled at the convention parliament in April 1660, Earl Banbury's right to the dignity was not questioned till July, nearly three months after parliament had met; and upwards of one month afterwards he is mentioned as present in the House of Lords. A day was appointed for investigating the earl's right to the title, but no proceedings took place, and he sat undisturbed till December. On the meeting of parliament in May the following year, no writ was issued to the Earl of Banbury, who immediately petitioned the king, that he might enjoy all the precedency and privileges granted by the letters patent of that dignity. This

claim excited the jealousy of the eight earls, who had been created between the coronation and date of his father's patent; but the Committee of Privileges heard his counsel and witnesses, who proved that Nicholas was born at the House of Lord Vaux, and equivocated in their testimony. The committee reported that Nicholas Earl of Banbury is a legitimate person. The attorney-general objected to issuing a writ of summons, on the ground that the Earl of Banbury was reputed childless, as proved by his majesty's message, and for the strictly technical reason that the *inquisitio post mortem*, 9 Car. I. had found that the late earl died without issue male, which could not be avoided without a traverse. The description in the settlement deed of 1646 was the Right Honourable Nicholas, now Earl of Banbury, heretofore called Nicholas Vaux; and the attorney-general laid stress on this designation, and on the fact of the countess marrying within five weeks; but hasty marriages, though suspicious, were by no means uncommon, and the marriage settlement of Lord Banbury himself with the countess was executed within little more than two months after the death of his first wife.

The House would not adopt the report of the Committee of Privileges, but had the whole matter examined at the bar, and directed that the report should be recommitted. The committee again reported that Nicholas Earl of Banbury, being in the eye of the law son to the late earl, the House should advise the king to send him a writ to come to parliament, but no writ was ever sent. In 1670 Lord Banbury presented a petition to the House of Lords, "that he may receive such a writ of summons to the parliament, as may enable him to serve his majesty there, according to the duty of his place and quality. No proceedings took place, and in four years the earl died. His son Charles attained his majority in 1684, and the very next year petitioned for his summons. His prayers proving equally futile, he did an act which compelled a decision. Having the misfortune to kill his brother in law in a duel, he was indicted by the name of Charles Knollys, Esq., and prayed the House of Lords that he might be tried by his peers: it was resolved that he had no right to the title, and that his petition should be dismissed. He was more fortunate in the Queen's Bench, where his plea in abate-

ment, "he not being named Earl of Banbury in the indictment," was allowed by the four judges. The brave Chief Justice Holt refused to give the angry lords the reasons for his judgment, asserting with manly freedom, "What a judge does in open court, he can never be arraigned for it as a judge. I am not in any way to be arraigned for what I do judicially. The judgment may be arraigned in a proper method by writ of error." Some rash peers would fain have sent the independent judge to the Tower for presuming to dispute their jurisdiction; but the counsels of more discreet senators prevailed, and the majesty of the law was successfully vindicated. The precedent has been followed in our own times, which have seen with admiration the Chief Justice of the Queen's Bench scorning to succumb to the usurped tyranny of the lower branch of the legislature, and equally triumphant in his spirited opposition.

Charles, Earl of Banbury, renewed his claim in 1712 by petitioning Queen Anne, whose demise put a sudden stop to the proceedings then in agitation. The unlucky peer renewed his prayer on the accession of George II., and the attorney-general reported that a new reference to the House of Lords on the claim was a matter not of law but of prudence, which must be left to the king's determination; the royal will was adverse, and for nearly eighty years the claim rested in abeyance, without any abandonment of the right, but without a renewal of struggles long importunate, and always defeated.

The descendants bore a barren title, but made no further effort to force open the reluctant door of the House of Lords till the commencement of the present century, when, on a prayer from Colonel Knollys by the style of William, Earl of Banbury, Sir Vicary Gibbs reported to refer his petition to the House of Lords, where it lay under close scrutiny and discussion eight or nine years. At the final hearing, against that strong phalanx of lawyers, Lords Eldon, Ellenborough and Redesdale, Lord Erskine earnestly contended that all the facts on which they relied might have occurred, and yet the children been the real issue of their ostensible father.

"Notwithstanding all that has been urged by the noble and learned lords opposite, I adhere to the opinion I expressed at an early period of the debate. I admit that the claimant labours un-

der great disadvantage. The facts involved in his case are extraordinary, and the grave has long since closed over all the individuals whose evidence could afford him any assistance. His claim is almost as old as the patent of his ancestor, and successive generations have passed away without a recognition of it by this House. Yet time would be the instrument of injustice if it operated to raise any legal bar to the claimant's right. Questions of peerage are not fettered by the rules of law, that prescribe the limitation of actions, and it is one of the brightest privileges of our order that we transmit to our descendants a title to the honours we have inherited, or earned, which is incapable either of alienation or surrender. But I will go further, and assert, that lapse of time ought not in any way to prejudice the claimant, for what laches can be imputed in a case where there has been continual claim? Nicholas, the second Earl of Banbury, presented his petition as soon as there was a monarch on the throne to receive it; and a series of claims have been kept up by his issue to the present hour.

"The rules relating to the bastardy of children born in wedlock may be reduced to a single point, *i. e.* that the presumption in favour of the legitimacy of the child must stand until the contrary be proved by the *impossibility* of the husband being the father, and this impossibility must arise, either from his physical inability, or from non-access. It has been urged that strong impossibility is sufficient, but this I confidently deny. We do not sit here to balance improbabilities on such a topic as this. The nature of the presumption arising from the access of the husband being ascertained, it is evident, that, if access can be proved, the inference from it is irresistible, whatever moral probability may exist of the adulterer being the father; whatever suspicions may arise from the conduct of the wife, or the situation of the family; the issue must be legitimate. Such is the law of the land. Women are not shut up here as in the Eastern world, and the presumption of their virtue is inseparable from their liberty. If the presumption was once overthrown, the field would be laid open to unlimited inquiries into the privacy of domestic life; no man's legitimacy would be secure, and the law would be accessory to the perpetration of every species of imposture and iniquity."

Lord Erskine then cited several cases in which reputation, adultery, treatment of the child, all went for nothing as non-access could not be shown; dwelling especially on the case of Boughton v. Boughton tried before Lord Ellenborough.

"The separation of the husband and wife—the intercourse of the

latter with Sir Edward Boughton—and the recognition of the child by that gentleman, were fully established. The baptismal register—the conduct of the mother—the reputation of the world—and the proceedings in Chancery marked her as an illegitimate child. The single circumstance of the mother's husband being alive was all that could be urged to the contrary. The legal presumption in favour of legitimacy wrung a verdict from the jury, which no one can doubt they would have gladly withheld.

“From these principles, supported by these cases, I infer that, without proof of non-access, the presumption derivable from access must be conclusive. Such is the law of England as it existed from early times to the present hour. I am not here to defend the law, but to administer it. Perhaps the lawgiver may have laid down a rule not always infallible ; he may in some instances have diverted hereditary wealth from its proper channel, by enriching the fruit of an adulterous intercourse, and he may thus have created the relation of parent and child where it had no real existence. In my opinion these occasional, and very rare, deviations from justice amount to nothing more than the price, which every member of the community may be called upon to pay for the privilege of an enlightened code. No laws can be framed sufficiently comprehensive to embrace the infinite varieties of human action, and the labours of the lawgiver must be confined to the development of those principles, which constitute the support and security of society. He views man with reference to the general good, and that alone. He legislates for men in general, and not for particular cases. No one can doubt that the interests of society are best consulted by making a question of such frequent occurrence as legitimacy to rest on a limited number of distinct facts, easy to be proved, but not to be counterfeited, instead of leaving it to be the result of inference from a series of indefinite facts, separately trifling, and only of importance collectively from the object to which they are applied. Marriage and cohabitation afford us a more sure solution of the question of legitimacy than we could arrive at by any reasoning on the conduct of the husband and wife.”

He then artfully combats the presumption drawn from the extreme age of Lord Banbury :

“There is no statute of limitations on the powers and faculties of man. Instances of robust longevity might be cited still more extraordinary. Sir Stephen Fox married at the age of 77, and had four children, the first child was born when the father was 78, the second and third were twins in the following year, and the fourth was born

when the father was 81. The Earl of Ilchester and Lord Holland can vouch for the accuracy of this statement, and, I believe, their genealogy has stood hitherto unquestioned. Parr became a father when even his son was of a more advanced age than Lord Banbury. Moreover, his lordship seems to have kept all his faculties both of body and mind in full exercise. Not only does it appear from the evidence of one of the witnesses that he went out hawking up to his death, but the journals of the house furnish us with the best evidence of his attention to more important matters.

"Nicholas, the original claimant, has been traced from his cradle to his grave, and every period of his life has been scrutinized in order to procure evidence of his illegitimacy. The dim twilight of two centuries has gathered round the events of his obscure career, and prevents us from forming a correct estimate of either their intrinsic or relative importance. If indeed we could transport ourselves to the troubled times in which he lived, we might venture to draw inferences from the vicissitudes of his domestic history, but it is now become a most fallacious experiment.

"Why is the bounty of Lord Vaux to his step-son to be ascribed to another motive than what belonged to such a relationship? Why is it to be assumed that he has repudiated the title of Banbury because he had been called in his earliest childhood by the name of Vaux? These are weak arms to encounter a presumption so strong as that which exists in favour of legitimacy.

"I trust, my Lords, that I have established that the opinion of the law entertained by the Committee in 1699 was well founded, and that Nicholas, the original claimant, ought to have been admitted to the full enjoyment and privileges of this earldom. The same rights have descended to the present petitioner, and I trust they will be recognized by your Lordships."

All Erskine's efforts were in vain. The Committee of Privileges resolved to report, by a majority of twenty-one to thirteen, that the petitioner had not made out his claim to the title, dignity, and honour of Earl of Banbury. But of this number four were spiritual lords, who had never attended the proceedings; and of the remaining seventeen, ten only attended occasionally. The whole thirteen comprising the minority had constantly attended. Upon those who voted, General Knollys, the present claimant, feelingly observes: "Death, since these proceedings took place, has been busy on both sides; but it seems to have moved with even accelerated step in that distinguished rank, which included, as most impressed with the justice of the claim, among lawyers, the names of

Erskine, Romilly, Perceval, and Hargrave; and some the most illustrious by their birth in the kingdom, and some that were absent on the day of trial, whose places were occupied by strange faces, assembled to give countenance to strange opinions."

Lord Erskine drew up a long, forcible, and eloquent protest, which was signed by the Dukes of Kent, Sussex, and Gloucester, and seven other peers; and in justification of this memorial the noble writer remarks, in a letter to his friend,—

"The protest gives them every fact, and all their arguments; but, giving them both, leaves them without a single voice in Westminster Hall from one end to the other. We protest"—(such was the conclusion of this voluminous but admirable document, the longest, yet most able, on the Journals of the House of Lords)—"We protest, for the reasons which we have recorded at such unusual length; because an unreasoned dissent would have thrown no light upon the grounds of a decision of vital importance in its consequences to the inheritance of the peerage, and because it would have been unworthy to have discussed it partially, so as to bring into discredit the justice of the house, whose decisions it is our duty to reverence and support."

For several years after this mortifying defeat, the wit and elegance of Erskine ceased to light up the tapestried chamber, and soften the asperities of debate. But when the political horizon began to be overcast, and the gathering discontents of the multitude appeared to the government to call for severe legislative enactments, the friend of the people reappeared in his place to deprecate coercion, and advocate freedom of opinion. The wild agrarian notions then afloat he would rather correct by the voice of the schoolmaster than the rod of the magistrate.

"As to the Spenceans, they could not be gravely considered as objects of criminal justice. Instead of the warrants of magistrates, the certificates of apothecaries might secure their persons, if they became dangerous. What other prison, indeed, but a madhouse, could be opened to receive persons so completely insane as to entertain an expectation, that, in such a country as England, they could bring its whole surface and property into general division and distribution!" To quiet the alarms then prevalent in the metropolis from the

violence of an anti-corn law mob, Lord Erskine volunteered his aid, and related anecdotes of his experience in tumult : " that he was in Bloomsbury Square when the mob, during the riots of 1780, were preparing to attack the house of Lord Mansfield, and offered to defend it with a small military force, but this offer was unluckily rejected ; that he was afterwards in the Temple when the rioters were preparing to force the gate, having fired several houses ; that he went forward to the gate, which he opened, and stood beside a field-piece prepared to fire in case the attack had been persisted in, but the populace were daunted, and fell back, &c. &c."

The results of his late practical knowledge in *rustication* are told with more grace than these somewhat vain-glorious recollections :

" Confide, my lords, in the people, and they will make the return of a corresponding confidence. Your lordships may very probably think the illustration of this truth, which I cannot help at this moment having resort to, is a very strange one ; but we are apt to take up our analogies and the expressions of our opinions and feelings from the objects in which we are most frequently engaged. Driven out as I have been, my lords, from the paradise of the law, and sent to till the common ground, I would liken this condition of a government to a late one of my own. Having engaged a celebrated drainer to lay dry a part of my estate, and being alarmed at seeing the water oozing out in every direction, I asked him, if he thought he could remove it except at an expense beyond the value of the land ? His answer was, ' Certainly not, when once the water finds its way here ; but I can stop it at its source, at a very small expense, and prevent it from coming here at all.' This is just your case : when once the multitude are discontented and indignant at misgovernment, all the parchment in England cut up into ex-officio informations would be no kind of cure for libels, but could only increase and inflame them."

When government persisted in their coercive measures, Lord Erskine played off his battery of humour on the most obnoxious of the Six Acts with considerable effect :

" What evidence have we of a traitorous correspondence ?—only the affirmations of A, B, C, and others, their companions !" [The names of the witnesses before the select committee had been printed with their initials merely.] I have not been accustomed to deal with these alphabetical witnesses, though I am obliged to confess that when I came to O, P, I thought there must have been a riot."

The orator warmly inveighed against the injustice of driving a man from his country for a second offence in publishing a seditious libel. "Banishment was only a mode of punishment by the Scotch laws. He had been banished into England himself exactly fifty-one years and a few days."

In opposing the Seditious Meetings Bill with more grave weapons of oratory, Lord Erskine confessed the secret of his comparative inefficiency as a debater :

"I despair altogether of making any impression by any thing I can say ; a feeling which disqualifies me from speaking as I ought. I have been accustomed during the greatest part of my life to be animated by the hope and expectation, that I might not be speaking in vain ; a sensation without which there can be no energy in discourse. I have often heard it said, and I believe it to be true, that even the most eloquent man living, (how then must I be disabled ?) and however deeply impressed with his subject, could scarcely find utterance, if he were to be standing up alone, and speaking only against a wall."

In June 1818, Lord Erskine brought in a bill to prevent arrests on charges of libel before indictment found. The Chancellor in a single word disposed at once of the main question, by asserting, that there was no such doubt upon the law, as the preamble recited. His precipitancy was thus rebuked with effective good humour :

"We are but too apt, after having delivered an opinion, rather to combat in its support, than to open the mind to impartial consideration ; yet I ought not to be afraid of this. My noble and learned friend can surely well afford to say he was mistaken : it would not at all affect his reputation for learning, but would on the contrary exalt it. There shoots across my mind at this moment a striking instance of this candour in Lord Mansfield, which I have long treasured up in my memory, having a strong interest to remember it, because it was useful to me in the beginning of my professional life. Having been engaged in a cause, in which that great chief justice had strongly supported the cause of my client, the jury found a corresponding verdict ; but a rule having been obtained to set it aside for the judge's misdirection, I had to support his opinion in the Court of King's Bench. When I had finished my argument, he said—I fear with more indulgence than truth—'this case has been remarkably well argued ; so well, indeed, that whilst the learned counsel was supporting my direction, I began to think I had been

in the right, whereas I never was more mistaken in my life. I totally misunderstood the case, and misdirected the jury; so there must be a new trial, and without costs.' Did this lower Lord Mansfield? So far from it, that, having persuaded myself his first opinion was the best, I could not help saying at the time, that, if I had not been convinced of his integrity I should have thought he was practising a fraud to advance his reputation. It was, indeed, a justice to truth, which weak men are afraid of making, and therefore it is so seldom made."

The orator's well founded complaint of an effect so deadening to eloquence as an audience fixedly adverse, and a certain, prejudged conclusion, was soon to be triumphantly removed. That extraordinary and miserable spectacle, the investigation of the guilt of Queen Caroline of Brunswick, succeeded, to divide the opinions and absorb the close attention of the assembled peers. However strongly we may dissent from Erskine's judgment as to the innocence of that unhappy princess, our sympathies with his magnanimous conduct would be cold indeed, were we not to pay a tribute of warm and grateful admiration to his chivalrous and disinterested bearing on that unprecedented trial. Attached to the king by marks of personal kindness, and long habits of intimacy, and almost a stranger to the queen, he yet took the part of one whom he deemed oppressed and borne down by calumny, with an energy and feeling, which kindled in his veins the forgotten fires of his youth. Party prejudice might, it is true, quicken his zeal—for the opposition made the cause their own; but these ties only slightly bound him, and his voice and vote were opposed to long cherished predilections. He declared on the opening of the court that he would do his duty, as if all the angels in heaven were taking notes of whatever passed through his mind on the subject; and we believe the solemn assertion:

"It is impossible," he said, when opposing the second reading of the bill, "to contend that this was not a national offence, and her majesty, if guilty, was clearly amenable to the House of Commons by impeachment for a high misdemeanor; and for this reason, my lords, (even if I gave credit to the evidence, which I do not,) I should equally reject the further progress of this bill. I am now drawing near to the close of a long life, and I must end it as I began it. If you strike out of it, my lords, some usefulness, perhaps, in

doing my part to aid in securing the sacred privileges of impartial trial to the people of this country, and by example to spread it throughout the world, what would be left to me? What else seated me here? What else would there be to distinguish me from the most useless and insignificant among mankind? Nothing, just nothing; and shall I then consent to this suicide, this worse than suicide of the body; this detestation of what can alone remain to me after death, the goodwill of my countrymen hereafter? I dare not do that. (His voice here suddenly ceased in the middle of his sentence, and after a long pause, he fell forward on the table in a senseless state: on raising his lordship, his speech and colour were gone. They were obliged to carry him out of the house to an adjoining room. His complaint was found to have arisen from a sudden and violent cramp in the stomach, which was greatly distended, his pulse for some time entirely ceased.)

“ Having recovered he resumed his argument a few days afterwards, and denounced the revolting part of the case for the prosecution, that a witness should be supported, as deserving some credit, who had proved to be perjured. ‘This reminds me of the strongest parallel case that I believe ever existed. An attorney of the name of Underwood had forged the will of a person at Bath, who died intestate; he had sworn to his being sent for, to his seeing the testator, and to the making and execution of the will, describing the very curtains of the bed he lay in, and the very colour of the ribbon round his head. He then turned king’s evidence, and to support an indictment was called to deny all this, though he had obtained a probate of the will on his own affidavit, swearing to all the facts I have stated. He was, I think, improperly admitted, but on his coming forward to deny every word he had sworn formerly, being the very fact in issue, I would not even sit in court to hear such testimony, and my friend Mr. Baron Garrow, now on the woolsack, who was counsel also in the cause, went out along with me into the sheriff’s apartment at the Old Bailey whilst he was examined, although our clients, who had no other advocates, were on trial for their lives, but they ran no risk, and the best service, indeed, we could render either to them, or to the public, was to show our utter contempt for such a witness.

“ If his majesty were ever exposed to any thing injurious I should be ready to protect him at the peril of my life, and to contribute to his happiness by every sacrifice but that of my duty. My principles I never have deserted, and never will desert. (Loud cheers.) When I could scarcely see the table before me for the petitions of the Dissenters which I presented to the House, no minister could have carried the Toleration Act through, and on my

motion it was instantly and without a struggle rejected, just as this measure, if persevered in, must infallibly perish."

When Lord Liverpool, after the slight majority of nine on the third reading, had moved that the further consideration of the bill be adjourned to that day six months, Erskine sprung up:

"I see the fate of this odious measure consummated. I heartily rejoice at this event. My lords, I am an old man, and my life, whether it has been for good or for evil, has been passed under the sacred rule of the law. In this moment I feel my strength renovated by that rule being restored. The accursed charge, wherewithal we had been menaced, has passed over our heads. There is an end of that horrid and portentous excrescence of a new law retrospective, iniquitous, and oppressive, and the constitution and the scheme of our polity is once more safe. My heart is too full of the escape we have just had to let me do more than praise the blessings of the system we have regained, but I cannot praise them adequately myself, and I prefer expressing my own sentiments in the fine language of one of the most eloquent authors of any age. He then cited the well known passage of Hooker, 'of law there can be no less acknowledged than that her seat is the bosom of God, &c.'"

With this triumphant *finale*, amid the cheers of an admiring audience, the curtain dropped on the political performance of this great actor in the House of Lords. The distinguished part which he took in advocating the innocence of the queen restored his long forgotten popularity, and threw a transient gleam over the closing years of his now clouded life. He was invited to a public dinner in the Assembly Rooms at Edinburgh, at which the Duke of Hamilton presided, and which was attended by the *élite* of the Scottish whigs, Cockburn, Jeffrey, Murray, Moncrieff, and Cranstoun. They drank the health of plain Thomas Erskine, the memory of the acquittal of Hardy, and revived in his breast the scenes of forensic triumphs that had long gone by. He was seen to shed tears at one of these allusions to the glories of former days. Among other anecdotes, with which he rewarded the respectful attention and homage of his hosts, was the following short history of the first case he ever answered.

"It was a case sent to him by a friend of his, who was inclined

to magnify facts. The client complained of a painter who had broken his written contract to paint a house, and the case stated that A. would prove this, B. that; and C. the other fact, and concluded with this laconic question: 'will an action lie?' To which he answered in terms as laconic, 'yes, if all the witnesses will lie too.'

As this was the first visit of Lord Erskine to his native city for above half a century, a popular demonstration of applause was attempted, and circulars were sent round the boxes on the night of his visit to the theatre, that the lawyer, who had conferred so much honour on his country, might be greeted as he deserved. Sir Walter Scott condemns this as a mendicant effort at popularity; but there is no proof that Lord Erskine was privy to the perhaps officious zeal of his friends, and every allowance should be made for an over-eagerness to obtain the favourable suffrages of his countrymen in one who having been so long estranged from them, pursuing a great and ambitious career elsewhere, would fain seek in their applause the faint echoes of what he had been.

The pleasures of life now lay chiefly in vivid memories of the past, and, but for occasional appeals to attention through the press, the veteran lawyer would henceforth have been forgotten by his contemporaries.

In 1822, shortly after Mr. Canning's appointment to the post of foreign secretary, Lord Erskine published a letter to the Earl of Liverpool on the subject of the Greeks, full of good feeling and false rhetoric: *i. e.* "I feel whilst I am writing that the ink must first have become blood to enable me fitly to express my detestation and abhorrence of their Turkish oppressors. To judge of what the Greeks under good government are capable of being, we have only to look back to what they have been. Their pedigrees, in which we can trace so many great men, who never should have died, ought to protect them from the Saracens, who cannot show in all their escutcheons a single man who should have lived."

Giving it as his opinion that the Turks should be thrust forth at once from Europe, he declares that "he would confide the matter to some long-practised diplomatist, with the assistance of a lawyer to draw up the notice to quit."

In this eagerness to expel the sons of the prophet from the fair shores of Greece, Lord Erskine was joined by the eccen-

tric and accomplished Lord Dudley and Ward, who wrote in a similar strain at this period to the Bishop of Llandaff, Sept. 1820. .

“ I am almost as enthusiastic on the subject of the Greeks as a German student, and I earnestly hope that no narrow over-refined notions about the balance of power will induce the English government to stretch out a saving hand to the Porte. I have always reckoned it to be the great disgrace of Christendom to suffer these hateful barbarians the Turks to remain encamped upon the finest and most renowned part of Europe for upwards of four centuries, during at least two of which it has been in our power to drive them out whenever we pleased. Let us at least have one civilized and Christian quarter of the globe, although it be the smallest.”

Incidentally dilating on the horrors of the Slave Trade, Lord Erskine apologizes for the warmth of his feelings by a retrospect of his past life.

“ After having in my earliest youth been an eye-witness to the enormities of this cruel traffic, when at its diabolical height ; after having seen upon the coasts of Africa the most unoffending of human beings torn from their parents and kindred, or deprived along with them, not only of liberty, but even of the light of heaven, chained down almost to suffocation in the breathless holds of a Guinea ship ; after having repeatedly beheld the hapless victims in this deplorable condition, and accompanying them in their paths over an unhearing ocean, have seen them thrown overboard, as they died, to the devouring sharks, that instinctively followed them in their course ; when, having seen long afterwards, and almost daily, for years together, those our unhappy brethren considered merely as property in our courts of justice, and been myself often personally engaged in investigating, as matters of account with underwriters, the course of their murderous deaths—when driven to desperation, during insurrections, they have plunged into the sea for escape—when, after all this, it fell at last to my lot, and through ways as unaccountable as unexampled, to preside in the Lords’ House of Parliament on their deliverance—to hold up in my hands the great charter of their freedom, and with my voice to pronounce that it should be law, your lordship, I am sure, whom I respect and regard as a man of honour and feeling, will rather approve than condemn my retaining the whole subject of slavery in the most affecting remembrance.”

A passing smile at the earnestness of these remarks may be indulged by those who have read the attestation borne by

Wilberforce in his Diary to a former very different state of feeling :

“ That the general bias of the bar was in favour of an established trade in slaves with Africa, was confirmed by the defence, which burst from the boisterous Thurlow, and for a moment trembled upon the lips of Erskine. “ The bar were all against us upon the question of the African Slave Trade. Fox could scarcely prevent Erskine from making a set speech in favour of the trade.” He afterwards notes down—“ Erskine with us ; but always absenting himself.”

The distance of time and improved tone of public feeling will sufficiently account for this inconsistency of sentiment. That the expression of his opinions was sincere, none who knew his ingenuous and open temperament could for a moment doubt.

The noble author forwarded his pamphlet on the Greeks to Lady Morgan, which, his fair correspondent observes, “ is worth citing, as a testimony to prove that years do not make age, and that freshness of feeling and youthful ardour in a great cause may survive the corporeal decay which time never spares even to protracted sensibility.” The place from which it is dated is not the least remarkable part of the note.

“ Dear Lady Morgan,

“ A long time ago, in one of your works (all of which I have read with great satisfaction) I remember you having expressed your approbation of my style of writing, and a wish that I would lose no occasion of rendering it useful. I wish I could agree with your ladyship in your kind and partial opinion ; but, as there never was an occasion in which it can be more useful to excite popular feeling than in the cause of the Greeks, I send your ladyship a copy of the second edition, published a few days ago. With regard and esteem, &c. &c. E.

No. 13, Arabella Row, Pimlico, London, October 11, 1822.”

His last fleeting publication was written the year of his death, in January, 1823, and is intituled “ A Letter to the Proprietors and Occupiers of Land on the Causes and Remedies for the decline of Agricultural Prosperity.” Tracing the ruined state of landed property to an excessive, and most unequal taxation, and most impolitic departures from the principle of the poor laws, he illustrates his positions with force and humour :

"Nothing can be more unjust than to intercept, as a tax upon property, the uncertain and fluctuating gains derived from professional industry and skill, dependent for their continuance, not only upon life, but upon health and strength, and even upon the opinions or favours of others. A friend of mine in Sussex had a useful servant, who managed his small farm, and, being satisfied with his services, gave him higher wages than the common rate; a comfortable house to live in, besides fire-wood, with some little advantages, which occasionally occurred. Nevertheless this innocent minded man, in a state of breathless agitation, addressed his master as follows:—'Master, be I bound to maintain five children?' To which the master said, 'Whose children are they?' 'Why, my own,' was the answer; to which the gentleman replied, 'Who else should maintain them?' 'Why, the parish,' replied the countryman, still more agitated. 'What can you mean by that?' said the master; 'have you not sufficient wages to maintain your wife and children comfortably?' 'Why, to be sure I have,' said the countryman, 'thanks to your honor's kindness; my wife is a sober good woman, so that we lays by a few shillings a week; but why be I to have no money from the parish, when every one else is paid who has children?' The end of this dialogue was that the man was directed never to think of the parish any more, and he now lives contented in his place."

It is a convincing proof of the buoyant temperament of the author, whose work might have been thought juvenile from internal evidence, that he should have continued gay and jocund in society, ready with his jest and pleasantry to the verge of life. He had many sorrows to contend against in old age, sharpened by his own imprudence. He had diminished his reputation, and increased his domestic inquietudes by a second thoughtless marriage. The excuse suggested by Sheridan, applying two lines of Dryden,

"When men like Erskine go astray,
The stars are more in fault than they,"

will hardly be admitted by the moralist. The absence of occupation, to which he was condemned, forms a better apology for his errors.

Pecuniary embarrassments mixed additional wormwood in his cup of bitterness. His large professional gains had been impaired by foolish investments. To the first inquisition on the income tax he made a return of 5500*l.* a year, and the profits of several years must have been considerably more,

He lost money on American securities, and made an injudicious purchase for 40,000*l.* of land in Sussex, on a wild speculation to supply all London with birch, which proved a complete failure. From a fall in the price of land, especially that of a poor soil, his investment became considerably deteriorated in value. By a singular run of ill-luck he was disappointed of large expectations, a recovery suffered for the express purpose of confirming the will having deprived him of some valuable estate in Derbyshire, that an admirer of his talents had bequeathed him.

The sudden reduction of his income to 4000*l.* a year, burdened with a peerage and a numerous family of children and grand-children, involved the ex-Chancellor in difficulties from which he never extricated himself, and which must have embittered the closing scenes of life. It was not one of his failings to undervalue money, but what he had acquired with ease he dispensed freely. As formerly mentioned, he had contributed large sums to the improvement of his favourite seat at Hampstead, where he past his happiest years. This, with other landed property, he was constrained to abandon. He dates his protest on Queen Caroline's trial, like his note to Lady Morgan, from Arabella Row, Pimlico.

Still amid misfortune he retained his good humour, and quitted the House of Lords with a joke, that Lords Eldon and Redesdale made such excellent judges of appeal that they ought to be impounded in the House. When questioned by Sir George Sinclair as to his opinions on a paper currency, he wrote laughingly, that his complaints related more to the quantity than to the quality of bank-notes.

He walked to the last with a light tripping air, rising jauntily on the instep, and bearing himself so erect as to elicit a compliment from majesty at the farewell levee. The "old man garrulous" would cheer himself with recollections of past triumphs, and on a table at Alfred's Club House show in what manner, and by what arts of rhetoric, he could have convicted the Queen. It was thus that he used to repeat his pleadings at Colman's dinner table, and when the host complaisantly observed, that his arguments were unanswerable, would reply, "by no means, my dear sir, had I been counsel for A., instead of B.: you shall hear what I would have advanced on the other side."

He fell in his latter days into the mischievous habit of taking opium to excess, that he might overcome by artificial spirits that sinking of the heart, which the consciousness of a ruined fortune and dimmed reputation could not but occasion.

At length that release came, which his best friends would have welcomed earlier. In the autumn of the year, 1823, when accompanying one of his sons to Edinburgh by sea, he was attacked with inflammation of the chest, a complaint from which he had before suffered severely, his only illness for a space of forty years. He was in consequence set ashore at Scarborough, whence he travelled by easy stages to Scotland. The complaint, however, rapidly gained ground, and on the 17th November he died at Almondell, his late brother's seat, six or seven miles from Edinburgh. On the 28th his remains were interred in the ancient family vault at Uphall. The funeral was private and unostentatious, the family carriages and those of a few friends following the hearse.

Lord Erskine's will is dated so far back as November 15th 1782, and it begins in nearly these words: "Being from a sense of honor, and not from any motive of personal resentment or revenge, about to expose my life to great peril, it is a comfort to me that I have so few duties to fulfil, previous to an event, which may deprive me of every other opportunity of so doing." He then proceeds to enumerate certain sums, constituting the amount of his property, which is stated to have been all acquired since his practice at the bar, and to be 9,000*l.* consols, and about 1,000*l.* more in bills: it is all left, with the highest expressions of confidence and affection, to his then wife for herself and children, they to inherit it after her decease, in equal shares, as they attain twenty-one. But he provided, as on account of her youth she might probably marry again, and as such an event, though by no means deprecated by him, might be incompatible with the interests of his children, that, upon such second marriage, the property should be transferred to his sister Lady Anne Erskine in trust, as above mentioned.

There is a codicil dated Carleton Hotel, Pall-Mall, October 2d, 1786, to confirm his will, his property since its execution having greatly accumulated, and for giving children since born, and future children, an equal participation. From their re-

mote date it is not surprising that these papers are somewhat defaced and mutilated, and it is remarkable that such a lapse of time, and change of circumstances, should not have induced a lawyer like Erskine to leave a more recent declaration.

By his first marriage, 29th March 1770, with Frances daughter of Daniel Moore, Esq., Lord Erskine had eight children: Frances, married to the Rev. Dr. Holland, Prebendary of Chichester; David Montague, the present Lord; Henry David, a clergyman; Thomas, one of the judges of the Common Pleas; one daughter, Margaret, unmarried, who survived him; also Mary, who married Edward Morris, the Master in Chancery, who died 1815. Two of his children, Elizabeth, who married in 1798, and died within two years after her marriage, and Lieutenant-Colonel Erskine Stewart, died in his life-time. This brave young officer, treading in his father's steps, had married at the early age of sixteen, and was on the Duke of Wellington's staff at Waterloo. Towards the close of the day a cannon shot struck him from his horse, shattered his left arm, and carried off two of the fingers of his right. As he lay bleeding on the ground, the Prussian musketry was heard at a distance. With heroic ardour, forgetting his wounds, he seized his hat, and waived it cheerily in triumph. The Duke of Wellington, who stood beside him, desired that the gallant youngster might be carried to his tent and immediately taken care of. He was speedily recommended for the rank of Major, and a year afterwards gazetted Lieutenant-Colonel and Adjutant-General in Ceylon. Consumptive symptoms, arising from his wounds, increased upon him during the winter, and he died on the passage to India, the worthy scion of a noble stock.

Of Lord Erskine's brothers, almost equally celebrated with himself, Sir Walter Scott has written an interesting notice in his *Diary* from personal knowledge.

"April 20th, 1829. Lord Buchan is dead, a person whose immense vanity, bordering upon insanity, obscured or rather eclipsed very considerable talents. His imagination was so fertile that he seemed really to believe the extraordinary fictions, which he delighted in telling. His economy, most laudable in the early part of his life, when it enabled him from a small income to pay his father's debts, became a miserable habit, and led him to do mean things. He had a desire to be a great man, and a Mæcenas—a *bon marché*.

The two celebrated lawyers, his brothers, were not more gifted by nature than, I think, he was; but the restraints of a profession kept the eccentricity of the family in order. Henry Erskine was the best natured man I ever knew, thoroughly a gentleman, and with but one fault. He could not say 'no,' and thus sometimes misled those who trusted him. Tom Erskine was positively mad. I have heard him tell a cock-and-a-bull story of having seen the ghost of his father's servant, John Burnett, with as much gravity as if he believed every word he was saying. Both Henry and Thomas were saving men, yet both died very poor; the latter at one time possessed 200,000*l.*, the other had a considerable fortune. The Earl alone has died wealthy. It is saving, not getting, that is the mother of riches. They all had wit. The Earl's was crack-brained and sometimes caustic. Henry's was of the very kindest, best-humoured, and gayest sort that ever cheered society; that of Lord Erskine was moody and muddish. But I never saw him in his best days."

Misfortune had sharpened the tone of Sir Walter's observations at this period, or he would have noted down, we may readily believe, with more good nature, the characteristics of this remarkable family. The humours of the eldest brother are delineated with such unsuspecting truth by himself, in his own egotistical letters, and, but for a slight outline of caricature, describe so faithfully the traits of the more fortunate Chancellor—his vanity, sensitiveness, and yearnings after distinction, that no one who loves to contemplate the finer shades of character, or to examine attentively the minute resemblances of a likeness, will blame his biographer for giving a few extracts.

Lord Buchan, according to his own report for a new edition of the Scottish Peerage, "was educated by James Buchanan of the family of the memorable poet and historian, under the immediate direction of his excellent parents. He was founded in the elements of the mathematics by his mother, who was a scholar of the great Maclaurin, by his father in history and politics, and by his preceptor in all manner of useful learning, and in the habits of rigid honour and virtue."

Proud and poor, subsisting barely on his patrimonial pittance of 150*l.* year, the Scottish earl could not forget the consciousness of royal blood, and refused to accept the post of secretary to an embassy at Lisbon, which Lord Chatham, his

fellow student at Leyden, had procured, because the ambassador, Sir James Gray, was a person of inferior rank. Though actually gazetted, he refused to proceed; and, strange to say, was commended for his refusal by Dr. Johnson, who, in a spirit of contention or egregious folly, declared that, had he gone, he would have been a traitor to his rank and family. Men of the proudest race and highest title, the Courtenays and Howards, are wiser now, and think it no degradation to enter into the junior ranks of the military, naval, and diplomatic professions.

The high-minded earl soon after withdrew from that public life, for which such feudal notions of inherited grandeur unfitted him. It is curious to read in his correspondence with Chatham the mention which he makes of the future Chancellor, and to think of the difference which afterwards took place in their relative positions:

“A brother of mine (Thomas Erskine) is just arrived from our colonies of East and West Florida, and gives me but a very unfavourable account of the capabilities of those countries. He brought me likewise a curious account of a negro conqueror, who has subdued a great part of Africa lying near our settlements, and has occasioned the building of our new fort on that coast. He carries eight Arabic secretaries, who record his feats in that language. My brother has also conversed with Commodore Byron's officers, and confirms the account of the Patagonian giants.”

Having pitched his tent in the “gude auld toun” of Edinburgh, the Earl of Buchan essayed to become a Mæcenas of literature, and founded a Society of Antiquaries, drawing up for their edification a correct life of the admirable Crichton, in which, as the preface assures us, many “falsities relating to this prodigy of human nature are detailed.” The fond author might vainly hope to insinuate a comparison between the merits of the great original and his own. But the pearl was cast before a greedy race, who only cared for paper as a medium of currency, and the discontented earl thus loudly vented his indignation to a literary friend:

“The illiberal opposition made to the charter of our society by the College of Edinburgh, the Faculty of Advocates, and the society calling itself the Philosophical, prove very glaringly, that it is no easy matter to copy the institutions of more polished nations in

a country, where a sordid, monopolizing spirit, engrafted on the remains of ancient barbarity, checks the progress of every thing that can tend to take the people out of their trammels. You will see from the caveats, and answers of our society, how ungenerously I have been requited by my countrymen for endeavouring to make them happier, and more respectable. This is the common lot of men who have a spirit above that of the age and country in which they act, and I appeal to posterity for my vindication. I could have passed my time much more agreeably among Englishmen, whose character I preferred to that of my own countrymen, in a charming country too, where my alliance with the noblest and best families in it, and my political sentiments, would have added much to my domestic as well as civil enjoyments; but I choose rather to forego my own happiness for the improvement of my native country, and expect hereafter that the children of those who have not known me, or received me as they ought to have done, will express their concern, and blush on account of the conduct of their parents. *Præclarâ conscientia igitur sustentor, cum cogito me de republicâ aut meruisse quum potuerim, aut certe nunquam nisi divinè cogitasse.*"

Though the retired earl could apply to himself the pompous eulogy of the Roman orator, he appears to have been imbued with less political courage than a Roman, and to have sometimes despaired of the commonwealth. Communicating to Mr. Nicholls the following year, December, 1784, "Remarks on the Progress of the Roman Army in Scotland during the sixth Campaign of Agricola," he thus querulously imparted his political griefs:

"Sir,

"Next to the united loss of health and character, accompanied by the gnawing torments of an evil conscience, is the misfortune to a good man of surviving the virtue, glory, and happiness of his native country. This misfortune is ours; and such has been the accumulation of disgrace and discomfiture that has fallen on us as a people since the last wretched twenty-four years of the British annals, that I turn with aversion from the filthy picture that is before my eyes, and look for consolation to the times that are past. It was in seeking, sir, for such opiates to the watchful care of a good citizen in a falling empire, that I fell into antiquarian research, and shall give you from time to time the results of it."

Overwhelmed with political dislikes, and want of sympathy

in his literary tastes, Lord Buchan shook off the dust from his feet on Edinburgh, and sought a more congenial abode at Dryburgh Abbey, not omitting to address the literati of Europe on the occasion in a circular Latin epistle. In improving the natural charms of this lonely retreat, the worthy peer found a healthy recreation; and, whilst pursuing statistical inquiries through the parish, gained an excellent excuse for self-adulation, and easy authorship:

"It is amazing," he writes, "the effect a pioneering genius has in exciting the curiosity of mankind to explore new paths, and un-beaten regions. My insatiable thirst of knowledge, and a genius prone to splendid sciences and the fine arts, has distracted my attention so much, that the candid must make ample allowances for me in any one department; but, considering myself as a nobleman, and not a peer of parliament, a piece of ornamental china, as it were, I have been obliged to avail myself of my situation to do as much good as I possibly could, without acting in a professional line, which my rank and my fate excluded me from. A discarded courtier, with a little estate, does not find it easy to make his voice be heard in any country, and least of all in Scotland."

On occasions which called forth his patriotism, however, the earl would make his voice heard across the Atlantic, and bestow tokens of his high approbation. In 1792 he sent to Washington a snuff-box made of the oak that afforded shelter to Wallace after the battle of Falkirk, and gained as excellent a return as in the old exchange between Glaucus and Diomedes. The gallant American forwarded his portrait in requital, and with the gift sent a grateful acknowledgment of the earl's tribute. "I accept," he writes, "with sensibility and satisfaction, the significant present of the box which accompanied your lordship's letter."

With the true ardour of a Scottish patriot, the descendant of the black knight of Lorn dedicated on 22d September, 1814, being the anniversary of the victory obtained by the brave Sir William Wallace at Sterling Bridge in 1297, the colossal statue of that hero, 21½ feet high, on a rock at Dryburgh, in the following very laconic and impressive manner—"In the name of my brave and worthy country, I dedicate this monument as sacred to the memory of Wallace."

“ The peerless knight of Ellerslie,
Who woo'd on Ayr's romantic shore
The beaming torch of liberty ;
And roaming round from sea to sea,
From glade obscure, or gloomy rock,
His bold compatriots called to free
The realm from Edward's iron yoke.”

Diversified with these innocent amusements, the useful, but secluded, life of the Earl of Buchan wore on calmly to an extreme old age, and, though his vanity may provoke a passing smile, the active encouragement which he gave to literature should command our indulgence for a failing which “ leaned to virtue's side.” His love of letters adds brightness to his coronet. Unable from limited means to give pecuniary aid, he would still by the exercise of kind offices, recommendations, introductions, or suggestions, promote the cause of youthful, lowly, and unfriended aspirants to fame. He thus assisted Burns, Tytler, and Pinkerton in their early struggles ; and, as an incentive to the study of the classics, founded an annual prize in the University of Aberdeen. It must be confessed the premium is classically minute in value, and founded on those gifts of parsley and laurel, with which the victors at the Olympic games were rewarded.

Of his brother, the Honorable Henry Erskine, for forty years the gifted leader of the Scottish bar, the Whig advocate of witty and benevolent memory, who can think or write without feelings of respectful admiration almost verging on idolatry ? Were there ten Erskines in the world, the cynic would burn his books ! The just appreciation of his virtues extended far beyond the circle of his friends. A writer in the west of Scotland, representing to a needy tacksman the futility of entering into a law-suit with a wealthy neighbour, received the ready answer, “ We dinna ken what ye say maister, there's nae a puir man in Scotland need want a friend, or fear an enemy, whilst Harry Erskine lives.” Remarkably handsome in face and person, taller than his brothers, and of graceful demeanor, the dean of the faculty of advocates was said by Lord Jeffrey, who knew and loved him, to have no rival in brilliancy of wit, charming facility of eloquence, and the constant

radiance of gay good humour, which enriched his manner in debate. "Inflexibly steady to his principles, yet invariably gentle and urbane in his manner of asserting them," the leader of opposition in Scotland was spoken of by all—even the staunchest Tories—with a feeling of personal kindness. Though disappointed in the hope of reviving the Chancellor of Scotland in his own person, and baffled in his attempts at obtaining those professional honors, to which none had so high a claim, not the slightest shade of discontent appeared to rest upon his mind, no drop of bitterness mingled with his blood. The idol of society, he used without abusing its pleasures; strictly moral and abstemious, he had no taste for expensive dissipations, and found, where he sought enjoyment, chiefly at home. He withdrew from the profession in 1812 to the elegant retirement of a country life, and was full to the last, though suffering from an incurable malady, of that festive gaiety of heart, and sympathy with innocent enjoyments, which made him the playfellow of the young.

The oratory of this fascinating pleader, less diffusive than Lord Erskine's, was relieved by those ready jests and touches of humour, which not even Scottish gravity or (the climax) Scottish judicial gravity could resist. The mirthful glee extended itself to the ermined sages, who found too much amusement in the scene to check the merry actor.

Opening the case of some venerable spinster with an unlucky name, he thus quietly inverted the order—"Maclean and Donald the defendants, Tickle the plaintiff, my lord." The titter of the court was raised to a shout by the grave chief good-humouredly retorting, "Tickle her yourself, Harry; you can do it as well as I."

His quick retort to Dundas—who offered to lend him his lord advocate's gown, as he would not want it long—that "he would not assume the abandoned habits of his predecessors," is one of the many good things he had always ready. The joke of scribbling *tu doces* on a tea-caddy is also attributed to him, but has since had many sponsors.

He would not disdain a pun, either in verse or prose, and struck off epigrams in court with all the readiness of his brother. The following is scarcely a fair specimen:

"On that high bench where Kenyon holds his seat,
 England may boast that Truth and Justice meet;
 But in a northern court, where Pride commands the chair,
 Oppression holds the scales, and judgment's lost in Ayr."

On reading Moore's Anacreon he improvised—

"Oh, mourn not for Anacreon dead;
 Oh, weep not for Anacreon fled;
 The lyre still breathes he touched before,
 For we have one Anacreon Moore."

With all his gaiety, Henry Erskine was unaffectedly religious, and lived in strict accordance to his faith. A strong devotional feeling distinguished the three brothers, tinged in Lord Buchan by an addiction to Methodism, and in Lord Erskine by a tendency to superstition. In addition to the ghost story scouted by Sir Walter Scott, the Chancellor told the following story, in a large company, to the Duchess of Gordon, which proves either his credulity, or love of mystification.¹

"I also," said Lord Erskine, after one of her grace's marvellous anecdotes, "believe in second sight, because I have been its subject. When I was a very young man, I had been for some time absent from Scotland. On the morning of my arrival in Edinburgh, as I was descending the steps of a close, on coming out from a bookseller's shop, I met our old family butler. He looked greatly changed, pale, wan, and shadowy as a ghost. 'Eh! old boy,' I said, 'what brings you here?' He replied, 'To meet your honour, and solicit your interference with my lord, to recover a sum due to me, which the steward at our last settlement did not pay.' Struck by his looks and manner, I bade him follow me to the bookseller's, and into whose shop I stepped back; but when I turned round to him he had vanished. I remembered that his wife carried on some

¹ A singular instance of his easy good faith was shown on occasion of the Ireland forgery, when, together with Parr, Boswell, and other credulous dupes, he signed an attestation of belief that the Shakespeare papers so impudently forged by young Ireland were genuine. "All I can say is," writes Erskine, "that I am glad I am not the man who has undertaken to prove Mr. Malone's proposition that the new Shakespeare was a forgery; for I think I never saw such a body of evidence in my life to support the authenticity of any matter which rests upon such high authority. I am quite sure a man would be laughed out of an English court of justice, who attempted to maintain Malone's opinion in the teeth of every rule of probability acknowledged for ages as the standard for investigating truth."

little trade in the old town ; I remembered even the house and flat she occupied, which I had often visited in my boyhood. Having made it out, I found the old woman in widow's mourning. Her husband had been dead for some months, and had told her, on his death-bed, that my father's steward had wronged him of some money, but that when Master Tom returned he would see her righted. This I promised to do, and shortly after fulfilled my promise. The impression was indelible ; and I am extremely cautious how I deny the possibility of such 'supernatural visitings' as those which your grace has just instanced in your own family."

A concentrated spirit of devotion was inherited in the Erskine family. Their great-grandfather was a Presbyterian sufferer in the days of Charles II. The names of Ralph and Ebenezer Erskine have received a stamp of especial reverence in what is called *par excellence* the religious world. Erskine's aunt, Lady Frances, was the wife of that brave and pious soldier Colonel James Gardner. His sister, Lady Anne Agnes, of whom Erskine is reported to have said, that he considered it his highest honor to have such a woman for his sister, was appointed treasurer of Lady Huntingdon's charities, and continued to superintend her chapel after her decease. At this chapel their father, towards the close of life, was a regular attendant. The solemn service which took place at Bath on his death, and produced a great sensation there, was of a character to make a deep impression on the mind of the future Chancellor. "All hath been awful," writes Whitfield in his strange but striking language, "and more than awful. On Saturday evening, before the corpse was taken from Buchan House a word of exhortation was given and a hymn sung in the room where the corpse lay. The young earl with his hand on the head of the coffin, the countess dowager on his right, Lady Anne and Lady Isabella on his left, and their brother Thomas next to their mother, with a few friends. On Sunday morning, all attending in mourning at early sacrament, they were seated by themselves at the foot of the corpse, and with their servants received first, and a particular address was made to them."

At eleven public service began, and Whitfield preached a funeral sermon. "The coffin being placed within a place railed in for the purpose, the bereaved relations sat in order

within, and their domestics outside the rail. Three hundred tickets of admission, signed by the present earl, were given to the nobility and gentry. Ever since there hath been public service and preaching twice a day. This is to be continued till Friday morning, then all is to be removed to Bristol in order to be shipped for Scotland."

The inscription on the Earl of Buchan's coffin runs thus :—

" His life was honourable—His death blessed,
He sought earnestly peace with God,
He found it
Alone in the merits of our Saviour."

On the head stone of his son must be graven the confession that he was a sincere Christian, too easily led away by temptation. The votive urn of friendship will record the social merits of the festive companion, ready patron, thorough gentleman,—full of generous impulses and honourable feelings, on whose genial character not a shade of pride, or envy, malice could rest, and in whose courtesy to all ranks of the profession there was no alloy. Rightly do the bar adore his memory, for generations of lawyers may pass away, ere they see his like again. The statue raised to his honour in Lincoln's Inn Hall, the bust dedicated in Holland House, with a just inscription "*nostræ eloquentiæ facile princeps*," will perish, sooner than the tradition of their fondness and his supremacy. But more enduring still, and lasting as the language in which they are printed, will be the monuments of his eloquence and relics of his power as an advocate. Long as the trial by jury shall exist, will the spells of the great magician be studied with care and admiration, but with little hope of rivalry, for his wand is broken, and its fragments lie scattered on his grave. Jurors might say to Erskine, as his admirers said to Sir Philip Sydney, "we listen, it is true, to others, but give up our hearts to thee."

T.

ART. III.—THE INTERNATIONAL LAW OF EMBARGO AND REPRISAL.

HOSTILE Embargo is imposed by a nation upon such vessels within her ports, or in foreign ports,¹ as belong to states, against whom she has declared or is about to declare war.² The effect of this embargo is to prohibit the departure of ships or goods from those ports until further order. But Embargo has a much more extensive signification, as ships are not only stopped from the before-mentioned motives, but are frequently detained to serve a prince in an expedition, and for this purpose often have their lading taken out, if a sufficient number of empty vessels be not procurable to supply the state's necessity, and this without any regard to the colours they bear, or whose property they are. Thus it frequently happens that many European nations may be forcibly united in the same service at a juncture, when most of the sovereigns are at peace with the nation against which they are obliged to serve.³

The confiscation of vessels detained by a hostile embargo seems at first sight to militate entirely with the modern principle of the law of nations, laid down by Vattel, that the property of an enemy within a sovereign's dominions at the time of the declaration of war cannot be detained. But a nation may receive injuries, for which an embargo upon the wrongdoer's vessels is the only means of enforcing redress. When such an injury is committed, the sovereign has a right to seize the offender's property provisionally, in order to force him to justice;⁴ and the act of seizure is equivocal, and liable to be varied by his subsequent conduct. Should that conduct be such as to establish the relations of peace, then the seizure would prove in the event a mere civil embargo or temporary sequestration, and the property would be restored, as is usual at the conclusion of those embargoes, which are often resorted to for various causes not immediately connected with any expectations of hostility. On the contrary, if the transactions end in hostility, the declaration of war has a retroactive effect,

¹ 2 Robinson, 211.

² Grot. c. ii. s. 10; 1 Black. Com. 270; 4 Mod. 177, 179; *Delmada v. Motteux*, Park's Ins. 6th ed. 311.

³ Beawes, *Lex Mercat.* Chitty's ed. 392; Molloy, b. i. c. 6, ss. 1, 2.

⁴ Vat. lib. ii. c. 18, ss. 340, 342.

and impresses the direct hostile character upon the original seizure, which is declared to be no embargo, but an act of hostility done *hostili animo ab initio* ; and the property taken is liable to be used as that of persons trespassers *ab initio* and guilty of injuries which they have refused to redeem by any amicable alteration of their measures.¹

The confiscation under a hostile embargo of enemy's property which comes to a sovereign's hands after the injury received, is not therefore the case of detaining such property being in the sovereign's dominions at the declaration of war, which is the act pronounced illegal by Vattel, but it is the case of a fair act of hostility after war begun,—wrongfully by the enemy, if his aggression amounted to an act of hostility, from the retro-active effect of the declaration of war; and justly by the confiscating sovereign if the embargo is to be considered, from the same retro-action, as the first act of hostility. There may be cases, in which the extent of this confiscation of property is very disproportionate to that of the aggression which caused the embargo; but it was in the enemy's power to redeem it by repairing the original injury, and it is for him afterwards to punish that over-measure of retaliation if he can; but the general right, as above stated, of confiscation after embargo, is consistent with the law of nations, and expressly sanctioned by Vattel.²

In the event of hostile embargo, the English law holds that the expense of wages and provisions falls upon the owner only, and the freight must bear it.³ In the case of an empty ship therefore, detained under the Dutch embargo of 1832, the judge of the Vice Admiralty Court of Gibraltar made the necessary food of the crew a lien upon the ship.

A capture may also be made previously to the formal declaration of hostilities under letters of marque and reprisal.

Reprisals are either general or special. A commission of general reprisals is stronger than even a declaration of war, authorizing the seizure of the goods of the foreign subjects everywhere and immediately, whereas by treaty in case of a declaration of war there are six months allowed to remove

¹ Per Lord Stowell, 5 Robin. 245, 246; see also 1 Robin. 117.

² Vat. lib. ii. c. 18, s. 342.

³ 2 Term Rep. 413, 4 East, 43, 546.

persons and property.¹ As the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, it is declared by the statute 4 Hen. V. c. 7, that if any subjects of the realm are oppressed *in time of truce* by any foreigners, the king will grant *marque* in due form.² These together with all other special reprisals, we believe, have been long dismissed;³ but the law regarding them is historically curious.

If during a war, a subject, without any commission from the king, or whilst the master is not on board, should take an enemy's ship, the prize would not be the property of the captor, but would be one of the *droits* of admiralty, and would belong to the king, or his grantee the admiral.⁴ Therefore, to encourage merchants and others to fit out privateers, or armed ships, in time of war, the lord high admiral, or the commissioners for executing that office, are empowered by various acts of parliament⁵ to grant commissions, called letters of *marque*, to the owners of such ships; and the prizes captured are divided according to a contract entered into between the owners and the captain and crew of the privateer.⁶ By the 22 & 23 Car. II. c. 11, if a merchant ship without a commission take a ship which first assaults it, the prize is divided between the crew of the ship and the owners in the manner practised by private ships of war. Sometimes the lords of the admiralty have their authority by a proclamation from the king in council.⁷ But all title to sea prize must be derived from commission under the admiralty. The governor of a province has no authority to grant such a commission without warrant from the admiralty.⁸

"The general law determines all commissions (says Sir Leoline Jenkins, in the case of a Portuguese letter of *marque*) most especially such as this is, to be *stricti juris*, and not to be further extended, either by inferences or deductions, than the express words do naturally import. So that whatever the meaning of that clause be, that De Bills may set out a man

¹ Marriott, 141.

² 1 Black. Com. 258, 259.

³ 1 Black. Com. 259, Christian's note 8; 2 Wheaton's Intern. Law, 7.

⁴ 29 Geo. 2, c. 34, 19 Geo. 3, c. 67, 32 Geo. 2, c. 25, 43 Geo. 3, c. 160.

⁵ Molloy, b. i. c. 2, s. 10.

⁶ 1 Black. Com. 259, Christian's note 8.

⁷ 1 Robin. 235.

⁸ Stewart's Rep. 382.

of war, and what other vessels shall be necessary for him (as if he might have several vessels at sea at one and the same time, and yet himself and his commission can be but in one of them) it cannot be said that he hath liberty to substitute or to depute another to act in his place; since there is no such power of deputation given him by his commission—much less can a copy or translation be authentic, when there is no clause providing to that effect in the original.”¹

Letters of marque may be vacated in three ways, by express revocation, by a cessation of hostilities, or by the misconduct of the grantees. Letters extraordinary, or general, which are granted during war, may be revoked at any time by the king’s pleasure.² And in a case of letters of special reprisal granted by King Charles the Second for the sum of £151,612, to Sir William Courten’s administrator, being the value of piratical seizures from him by the Dutch, in which letters patent there was a clause that no treaty of peace should prejudice them, the king, having by several treaties of peace with the Dutch expressly articulated that the Dutch should not be prejudiced by these letters patent, Lord Nottingham, C. repealed them; and said that letters of reprisal may be revoked and amortised by a truce, or by letters of safe conduct, and *à fortiori* by a treaty of peace.³ Lord Clarendon concurred in this opinion, but the grantee refused to deliver up the letters patent and fled to France, where he took the opinion of a Parisian lawyer, who thought very justly that the English government ought first to have made satisfaction to the party injured or endamaged, and added that the King of France would have sold his bed from under him sooner than have incurred the dishonour and reproach of such an action.⁴

“Letters of reprisal (says Molloy)⁵ granted in the ordinary way, *during a truce*, under the statute of Henry V. (a manner

¹ 2 Life of Sir L. Jenk. 728.

² Molloy, b. i. c. 2, s. 10.

³ 1 Vern. 54, 3 Swanston, 669.

⁴ 4 Kippis’s Biog. Brit. 330. “Lady Kent articulated with Sir Edward Herbert (her standing counsel) that he should come to her when she sent for him, and stay with her as long as she would have him, to which he set his hand: then he articulated with her that he should go away when he pleased, and stay away as long as he pleased, to which she set her hand. This is the epitome of all the contracts in the world betwixt man and man, betwixt prince and subject: they keep them as long as they like them, and no longer.”—*Selden’s Table Talk*.

⁵ B. i. c. 2, s. 8.

of granting which Mr. Christian conceives to have been long disused¹) cannot safely be revoked, though perhaps, in point of state, there may be a suspending of the execution of them, grounded on the public good; and the reason wherefore they cannot be revoked or annulled is, because after the person injured hath petitioned and hath according to law made out by proof his loss, and letters of request have gone, and no reparation made, then the letters patent of reprisal being sealed, the same do immediately create and vest a national debt in the grantee, to be satisfied in such manner and by such means as the same letters patent do direct, out of the goods and estates of *his* subjects who refuses or protelates to do right. However, as the king hath the legislative power of peace and war, in a public treaty for the nation's good they may be mortified, and then revoked by the great seal in pursuance of that treaty."

It appears that, before the granting of special reprisals, a request of satisfaction must be made, as well to the aggressor as to the sovereign power of the state to which he belongs,² or to its courts of justice.³ And therefore Lord Nottingham said in Sir William Courten's case that it was a considerable question whether those letters of marque were ever good, because they were granted *flagrante bello*, at which time the previous conditions of letters of request &c. could not be observed.⁴

That special reprisals are governed, both in the process and execution, by the strict rules and measures of recovering ordinary debts or damages, is evident from the rule that the repricee must have his cause deduced and his losses upon due proofs stated, in his very commission; and if he light on a richer prize than his losses are stated at, he must refund the overplus by the law.⁵

Letters of marque may also become vacated by the misconduct of the grantees. "The law is laid down by the prize-act,⁶ (says Lord Stowell⁷) which expressly inflicts upon all acts of cruelty the forfeiture of letters of marque; and this I

¹ 1 Black. Com. 259, note 8; 2 Wheaton's Intern. Law, 7.

² 2 Woddeson, 437.

³ 3 Brown's Reports, 297; 1 Ves. jun. 382; 4 Brown, 185; Grot. lib. iii. c. 2, s. 4; 2 Life of Sir L. Jenk. 759, 778; 2 Chalmer's Opinions, 353.

⁴ 3 Swanston, 670.

⁵ Life of Sir L. Jenk. 759.

⁶ 43 Geo. 3. c. 160.

⁷ 5 Robin. 10, and see 40, 357.

consider to be no more than a formal declaration of what was the ancient law of the admiralty. During the contest, destruction is necessary and lawful; but it is contrary to every principle of the law of nations, that, after the contest has ceased, hostile and destructive force should still be continued."

A subject of our king cannot receive letters of marque from any other state to capture the property of His Majesty's allies;¹ but the master of a vessel, cruizing under such letters against one state, is at liberty, on obtaining notice of hostilities commenced against another, to capture property belonging to that state, under the supposition that his owners would be active in their interests, and use immediate exertion to arm themselves with a commission against that other state.²

"Reprisals (says Vattel³) are frequently confounded with embargoes. The effects thus seized upon are preserved while there is any hope of obtaining satisfaction. As soon as that hope disappears, they are confiscated, and then the reprisals are accomplished. In reprisals we seize on the property of the subject, just as we would on that of the state or sovereign: every thing that belongs to the nation is subject to reprisals, whenever it can be seized, provided it be not a deposit entrusted to the public faith."

As letters of marque were, before the statutes last cited, granted only to those who had been personally injured by the other state, the term *marque* is treated by Mr. Justice Blackstone as synonymous with *reprisal*. "Letters of marque *and* *reprisal* (he says) may be obtained in order to seize the bodies and goods of the subjects of the offending state, until satisfaction be made."⁴ We have seen that this constitutes a distinction from the effect of the modern letter of marque.

"It is not the place of any man's nativity (says Molloy⁵) but his domicile—not of his origination but of his habitation—that subjects him to reprize. If therefore letters of reprisal should be awarded against the subjects of the Grand Duke of Florence, and a native of Florence (but denizenized or naturalized in England) should have a ship on a voyage to Leghorn, if a capture should be made, the same is not lawful. Letters of marque and reprisals (he adds⁶) cannot touch ambassadors,

¹ 2 Vern. 592.

² 5 Robin. 362.

³ Lib. ii. c. 18, ss. 342, 344.

⁴ 1 Black. Com. 258.

⁵ B. i. c. 2, s. 16.

⁶ B. i. c. 2, s. 18.

their retinue and goods, nor those who travel for religion, nor students, scholars, or their books, nor women or children, nor those that travel, nor ecclesiastical persons. A merchant of another place than that against which reprisals are granted, albeit the factor of such goods were of that place, is not subject to reprisals. Ships driven into port by storm or stress of weather have an exemption from the law of reprisals, according to the *jus commune*; but by the law of England otherwise, unless expressly provided for in the writ of commission. But if such ship fly from her own country to avoid confiscation or some other fault, and is driven by stress of weather, she may then become subject to prize. But it is not lawful to make seizure in any ports, but in his who awarded the reprisal, or his agent whom the same issued; for the ports of other princes and states, the peace of them is to be maintained."¹

By the treaties between England and France of 29th August 1610 and 29th March 1632, it is provided that no letters of marque shall be executed within the ports, roads, or harbours of either prince, unless upon the wrong-doers themselves or their goods.²

"A safe conduct (says Lord Nottingham C.) doth supersede all letters of marque; and so it was ruled in the parliament of Paris against the merchants of Montpelier, who would have executed their letters of marque against the subjects of Genoa, upon such as came thither by safe-conduct, as appears by the judgment of the parliament, 2 Hen. V. pl. 1, Rot. Par. No. 34, where some citizens of London, who had letters of marque against the Genoese, petitioned the King that he would be graciously pleased hereafter to grant them no safe-conduct in prejudice of those letters of marque. And before that, viz. 11 Hen. IV. Rot. Par. No. 66, John Kedwelly de Bridgwater complained in parliament of divers injuries done him by the French, and prayed letters of marque and reprisal, as well by sea as by land, against all those who have no safe-conduct: the answer was that letters of request ought first to precede; but it was admitted on all hands that a safe-conduct would prevail."

B. F.

¹ B. i. c. 2. s. 19.

² 2 Life of Sir L. Jenk. 769.

³ 3 Swanston, 671.

ART. IV.—WARDS IN CHANCERY.

IN commencing our inquiry into the jurisdiction of the Court of Chancery over the wards of the court, we encounter a subject, upon which great doubts have been entertained,—the origin of the jurisdiction. It is a subject to which all the text writers who have treated of this branch of law have successively alluded; yet none of them appear to be completely satisfied with the results of their investigation. The judges, who have mentioned it in their judgments, have generally referred to the existing difficulties, and have then contented themselves with resting the authority which they exercise upon established usages. We propose in the first instance to lay before our readers the different opinions which have been suggested; and we have no more satisfactory means of doing so than by quoting the statement of them which has been made by Mr. Justice Story:

“And¹ in the first place, as to the jurisdiction over the person and property of infants. The origin of this jurisdiction in Chancery (for to that court it is practically confined, as the court of Exchequer as a court of equity does not seem entitled to exercise it,) is very obscure, and has been a matter of much juridical discussion. The common manner of accounting for it has been thought by a learned writer to be quite unsatisfactory. It is that the king is bound by the law of common right to defend his subjects, their goods, chattels, lands and tenements; and therefore in the law every loyal subject is taken into the king's protection. For which reason an idiot or lunatic, who cannot defend or govern himself, or order his lands, tenements, goods or chattels, the king, of right, as *parens patriæ*, ought to have in his custody, and rule him and them. And for the same reason the king as *parens patriæ* ought to have the care of the persons and property of infants, where they have no other guardian of either.

“The objection urged against this reasoning is, that it does not sufficiently account for the existing state of the jurisdiction; for there is a marked distinction between the jurisdiction in cases of infancy and that in cases of lunacy and idiocy. The former is exercised by the chancellor in the Court of

¹ Story, *Eq. Jurisp.* 2. 516.

Chancery, as a part of the general delegation of the authority of the crown, *virtute officii*, without any special warrant; whereas the latter is exercised by him by a separate commission under the sign manual of the king, and not otherwise. It is not safe, or correct therefore, to reason from one to the other, either as to the nature of the jurisdiction or as to the practice under it.

“An attempt has also been made to assign a different origin to the jurisdiction, and to sustain it by considering guardianship as in the nature of a trust, and that therefore the jurisdiction has a broad and general foundation, since trusts are the peculiar objects of equity jurisdiction. But this has been thought to be an overstrained refinement, for although guardianship may properly be denominated a trust in the common acceptance of the term; yet it is not so in the technical sense in which the term is used by lawyers, or in the Court of Chancery. In the latter, trusts are invariably applied to property (and especially to real property), and not to persons. It may be added, that guardianship, considered as a trust, would equally be within the jurisdiction of all the courts of equity; whereas in England it is limited to the chancellor sitting in chancery.

“An attempt as also been made to derive the jurisdiction from the writ of Ravishment of Ward and the writ *De Recto de Custodia* at the common law, but with as little success. For independently of the consideration that these writs were returnable into a court of common law, it is not easy to see how a jurisdiction to decide between contending competitors for the right of guardianship can establish a general authority in the Court of Chancery to appoint a guardian in all cases when one happens to be wanting.

“It has been further suggested that the appointment of guardians, in cases where the infants had none, belonged to the chancellor in the Court of Chancery before the erection of the Court of Wards, and that upon the abolition of that court it resulted to the king in his Court of Chancery, as the general protector of all the infants in the kingdom. But this (it has been objected) is rather an assertion than a proof of the jurisdiction; for it is difficult to trace it back to any such ancient period. The earliest instance which has been found of the

actual exercise of the jurisdiction by the chancellor to appoint a guardian upon petition without bill, is said to be that of Hampden in the year 1696. Since that period indeed it has been constantly exercised without its once being called in question. Mr. Hargrave has not hesitated to say that although the jurisdiction is now unquestionable, yet it seems to have been an usurpation, for which the best excuse was that the case was not otherwise sufficiently provided for. He has added, that although the care of infants as well as of idiots and lunatics should be admitted to belong to the crown, yet that something further is necessary to prove that the Chancellor is the person constitutionally delegated to act for the King."

Such is the general statement of the theories upon this perplexed question. We are well aware that the solution of it which we offer for the consideration of our readers, will be received with a reasonable suspicion, that we shall not succeed in our attempt to remove the doubts, which have prevailed in the minds of many eminent lawyers.

There appear to be three subjects involved in the question, first, the title to the guardianship of the person ; secondly, the title to the guardianship of the property ; and thirdly, the general protection of the infant both as between him and his guardian, and also as between him and all the rest of the world. We cannot help thinking that the reason why our legal and historical authorities have found difficulty in accounting for the origin of the jurisdiction, is that they have not drawn a line sufficiently distinct between these several subjects.

Long ago¹ Lord Macclesfield drew the distinction between the *guardianship* and the *care* of the infant. That the care of the infant, in the meaning in which Lord Macclesfield used the term, must have always belonged to the crown will probably be conceded. We shall see that under the circumstances in which infants have been placed at different periods of our history, the appointment of a guardian has necessarily become part of the system, by which this general care and superintendence has been carried into effect.

The duty of the sovereign to protect his liege subjects is of

¹ "The court has the care not the guardianship of the infant." *Eyre v. Shaftesbury*, 2 P. W. 117.

the most extensive character. It is part of his office as the general dispenser of public justice. Those who are accounted competent to manage their own affairs themselves claim from their sovereign in his courts of justice the enforcement of their rights. Those who from age or from defective understanding are precluded from advancing claims on their own behalf still have their rights, not merely such as legal guardians will enforce against other members of the community, but also such as are necessary between themselves and their guardians for their own welfare and preservation. The principles of our constitution require that the protection of the sovereign, due as it is to every member of the state according to his peculiar circumstances, should be extended with scrupulous attention over those who in the eye of the law are incapable persons. "That¹ in every civilized state such a superintendence and protection does somewhere exist will scarcely be controverted."² That it exists by our constitution in the sovereign is the inference from a well known maxim, "Protectio trahit subjectionem, et subjectio protectionem."

Persons who think that this jurisdiction is not to be traced to the authority of *parens patriæ* have endeavoured to derive an argument from the circumstance, that the authority of the crown over lunatics and idiots is derived from statute.³ Although the argument comes from that eminent lawyer Mr. Hargrave, we cannot help thinking that in reality it is inapplicable to the question. That statute, so far as it relates to the care as distinguished from the *guardianship* of lunatics and idiots, is only declaratory of the common law. So far as it relates to the guardianship, it determines a matter not of jurisdiction, but of administration. Had the statute never been passed, there is no reason why the court might not in certain cases have been compelled to appoint a guardian for the mere discharge of its duty in taking *care* of the lunatic.

The distinction between administration and jurisdiction is marked by the different modes in which the chancellor's authority is conferred in the two cases. In the one he acts as judge in the Court of Chancery, exercising the common judicial authority delegated to that court by the sovereign. He

¹ Chit. de Jud. p. 12.

² Fonb. Eq. 2, 229.

³ 17 Ed. 2, c. 9, c. 10.

acts as the representative of the sovereign in a matter in which the sovereign has no interest. In the other he is a commissioner of the crown, acting under a sign manual, the usual form in which the sovereign commits to a subject the management of a matter in which the sovereign has an interest.¹

The reasoning of Mr. Hargrave amounts to this, that in tracing this jurisdiction to the authority of *parens patriæ* we prove too much, because, if it had arisen from that authority, it would have been exercised in a manner precisely similar over idiots and lunatics, whereas we know that over these persons it is exercised by a separate commission. We reply by again adverting to the distinct characters in which these different kinds of interference take place. As to idiots and lunatics the king is himself guardian by law; as to infants it is incumbent upon him to afford all proper protection, and as incident to the performance of that duty, to appoint a guardian; but he is not himself the guardian. It is very natural that the modes in which these two different duties are delegated to the chancellor should be distinct from each other. If the 17 Edw. II. had never been passed, the distinction between infants on the one hand and idiots and lunatics on the other would never have existed; and it appears to us that in that case the abolition of tenures, which would have deprived the idiot and lunatic of the guardianship of the lord of the fee, would have thrown upon the crown the duty of providing persons to fill that office. In that case the proceedings in respect of those incapable persons would have been precisely the same as the proceedings in respect of infants.

The distinction between *care* and *guardianship* may be illustrated by reference to some of the numerous cases in which the crown fills two different characters, having an interest, that is a right to be administered, as well as an au-

¹ Fonb. Eq. 2, 230. Lord Loughborough says, "the course upon the statute (i. e. 17 Ed. 2, c. 10,) has been that the crown has committed to a certain great officer of the crown, not of necessity the person who has the custody of the great seal, though it generally attends him, by warrant from the crown, which confers no jurisdiction, but only a power of administration. If that power is abused, if anything wrong is done or error committed, the appeal is immediately to the king, and not in the ordinary course attending the established jurisdictions of the kingdom. The orders that are made by the persons charged with the custody of lunatics are appealable to the king in council," *Oxenden v. Compton*, 2 V. 71 a.

thority or jurisdiction to be exercised. Respecting charities, the sovereign interferes in both ways. In the one he interferes as the person beneficially entitled, because the charity exists for the public benefit, and the public interests are supposed in law to centre in the crown. Thus the sovereign, as a kind of party to the matter in issue, appears in court by the attorney general. He also in the person of the judge superintends the due determination of the matter in issue between the attorney general, that is the public, and the holders of the charity fund. Crimes again are matters in which the sovereign bears a twofold part. The proceedings against the prisoner are taken in his name; the pleas are pleas of the crown; "the king, in whom centres the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the public prosecutor for every public offence."¹ The sovereign takes also another part in the proceedings, for the judge is merely his deputy; it is through the exercise of judicial functions, which in reality emanate from him, that the trial takes place.

To return to the case of infants, we may quote a passage in the report of *Morgan v. Dillon*,² which recognizes the twofold character of the sovereign's relation to his ward. "At common law, before the statute 32 Hen. 8, c. 24, by which the court of wards and liveries was erected, the lord chancellor was the sole judge of wardships: but with this difference, that where they are lucrative to the crown, there the lord treasurer acted, who had a concurrent jurisdiction with the chancellor; but where wardships were not lucrative to the crown, but only for the benefit of the ward there the chancellor alone had the disposition and management of the ward." We are not now speaking of the mode or court or officer anciently selected by the sovereign for the exercise of this jurisdiction, we are simply shewing that this duty of protection was one of the duties belonging to the sovereign office, upon which point we venture to think that no reasonable doubt can be entertained.³

¹ 4 Black. Com. 2.

² *Morgan v. Dillon*, 9 Mod. 139.

³ Speaking of the care of infants, Lord Redesdale observed, "With respect to the care of infants, can there be a stronger proof that it was conceived to be reserved

We now come to the other two subjects included in the question, namely, the title to guardianship of the person and the title to guardianship of the property; two subjects which we treat together, as with reference to the question of origin both are to be determined upon the same considerations. The law has at different periods recognized many different classes of guardians, as guardians in chivalry, guardians in socage, guardians by nature, guardians for nurture. With respect to lands, in which the tenure was of knight's service of the king, the king was anciently the guardian, but he held the office, not as king, but as a feudal chief. "We have grave professors of the common law," says Lord Bacon,¹ in his speech as king's solicitor, "who will define unto us that those are parts of sovereignty and of the regal prerogative which cannot be communicated with subjects: but for tenures, in substance there is none of your lordships but have them, and few of us but have them. The king indeed hath a priority or first service of his tenures and some more amplitude of profit in what we call tenure in chief: but the subject is capable of tenures: which shews that they are not regal nor any point of sovereignty." In conformity with this position is the following passage which Lord Bacon² puts into the mouth of James the First. "First, therefore, his majesty hath had this princely consideration with himself, that as he is pater patriæ, so he is by the ancient law of this kingdom pater pupillorum, where there is any tenure by knight's service of himself; which extendeth almost to all the great families noble and generous of this kingdom: and therefore being a representative father, his purpose is to imitate and approach as near as may be to the duties and offices of a natural father in the good education, well bestowing in marriage, and preservation of the houses, woods, lands and estates of his wards."

to the crown than this:—that the city of London claim, as an immemorial right, and a right which must have been derived to them from the crown, the care of orphans, and that they have most extraordinary powers for that purpose, extending to enable the court of orphans to commit to Newgate a person who disobeys their order. That has been allowed in a court of common law, and it is founded upon usage, which must have been founded originally upon a grant from the crown of such powers to the corporation of London." *Wellesley v. Wellesley*, 2 Bligh's R. (N. S.) 131.

¹ See the Speech of the King's Solicitor on Wards and Tenures, 7 James 1.

² Frame of declaration for the master of the wards. Bacon's Works, iii. 361.

It is quite a mistake to suppose that the court of wards originated in the exercise of the royal prerogative. The King acted in that court only in the capacity of feudal chief, and dealt only with those infants who were his wards by feudal tenure, the infant heirs of lands held of him by knight's service. The guardianship of lunatics and idiots belongs to the sovereign under a different kind of right, that is, by statute; and it was merely by an accident, or rather upon grounds of convenience, that the administration of both kinds of guardianship took place in the same court. The king, as guardian of the idiots, took a beneficial interest in their lands. As guardian of lunatics, he took in their lands a legal not a beneficial interest. Before the statute the guardianship of these persons was in the lord of the fee:¹ it was transferred to the crown on account of the shameful abuses to which it gave rise. The court of wards was established by statute 32 Hen. 8, c. 46; it was abolished at the restoration of King Charles the Second;² but we are not aware that any part of its history will aid us in our present inquiry.

At the Restoration military tenures were destroyed; and it was enacted³ that all tenures, with the exception of tenures in frank almoign, grand serjeanty and copy, should be turned into free and common socage. It is also enacted that a father should be allowed to appoint by deed or will a guardian to his children. These laws, in conjunction with the statute of wills, by which the owners of land are enabled to devise it, produced an important effect upon the position of infants. So long as land passed of necessity to the heir, the guardian by tenure, whoever he might be, was willing and anxious to undertake the office; but when the land went to the devisee, and there remained the infant without inheritance, no one was at all anxious to perform the functions of guardian. The right of guardian by socage is a right which exists at the present day, and may be claimed at any time; in decisions upon questions of settlement it has been asserted successfully within a very few years.⁴ But it is a thankless office, which is almost universally declined. In the case of *Morgan v. Dillon*⁵ the

¹ Reeves's History of the Law, p. 307, and 17 Ed. 2, c. 9, 10

² 3 Bl. Com. 259.

³ 12 Car. 2, c. 24, ss. 1 & 7.

⁴ *Rex v. Inhabitants of Oakley*, 10 East, 493.

⁵ 9 Mod. 139.

Court observed "by virtue of the statute of wills fathers did usually devise their socage lands by will to some persons in trust for the heir during his infancy; and by this means the guardian in socage, perceiving there was no benefit to be had by the guardianship, very often declined it; so that the heir was without a guardian, which being a very great inconvenience was intended to be remedied by the aforesaid statute 12 Car. 2, c. 24, which gave the father a power either by deed or will to appoint a guardian."

Another change which made an essential difference was the growth in the quantity and importance of personal property. With this property guardians in socage have nothing to do; and unless a guardian has been appointed by the father an infant may have enormous wealth, and still be without a guardian.¹

The general result of these changes was, that the infant was often placed in these circumstances. His father being dead, he had no guardian by nature: nor any testamentary guardian, because his father had omitted to name one. His guardian in socage would not act, because his land had been devised to a third person in trust, and the feudal guardianship was no longer in existence. Or he had no guardian in socage, because the property of which he had become possessed was only personalty. Where then was he to obtain the protection due to him? or in other words where was he to find a guardian?

In order to answer these questions, we have only to observe the objects for which the *parens patriæ* had hitherto interfered, namely, to secure the rights of the infant in whatever circumstances he might be placed. Hitherto the *parens patriæ* had found him already under the care of a guardian. To appoint one had therefore been unnecessary. But now, as the infant had no guardian, and as, in the absence of such a protector, he could not be safe or properly maintained, the same objects

¹ As long as the feudal tenures remained, generally speaking, infants who had lost their parents were under the protection of the law which then existed with respect to the treatment and care of the children. When that was at an end, it was thought fit by a particular statute to enable the father to make an appointment of a guardian for his children, giving to him the power, which that statute gave, to select proper persons for that purpose. *Wellesley v. Wellesley*, 2 Bligh's R. (N. S.) 129.

could not be accomplished unless the appointment was made by the court.¹ In the early periods of our history, the court did not make these appointments, and simply for this reason, that there are guardians by law and the appointments could not have taken effect except by violation of legal rights. But now the power of the court was called into operation for the purpose of supplying the defect, which had arisen out of a change in the law. "If one might venture to make a suggestion in a case where there seems no small diversity of opinion, it would be, that upon general principles the king as *parens patriæ* has an original prerogative to take care of the persons and property of infants, of idiots, and of lunatics, in all cases where no other guardianship exists. So long as any special guardianship exists by law or custom in other persons, the prerogative of the crown is inactive, but not suspended. The jurisdiction generally belongs to the Court of Chancery, as delegate of the crown, except where it is specially or personally delegated or restricted by statute."²

Thus, we think, the ancient authority of the *parens patriæ*, which had existed from time immemorial, and had been always exercised in compelling guardians to do their duty to infants, was called into action upon principles well recognized, though under circumstances entirely new, when the court appointed guardians for infants who were without them. The authority had been always in action with a view to secure the infant's rights. Its assistance had not hitherto been required for the appointment of guardian. But now, when the office of guardian was no longer filled under general rules of law, the defect was supplied by the interposition of the sovereign³ as *parens patriæ*.

¹ Lord Redesdale, speaking of the duty of the king as to lunatics, says that he is to act as *parens patriæ*, as the person to take care of those who are incompetent to take care of themselves. *Re Fitzgerald*, 2 Sch. & Lef. 436.

² 2 Story, Eq. Jurisp. 525.

³ The following passage seems to support our view of the question. "The king shall protect him who cannot protect himself, as is aforesaid, and shall take the profits of his lands and of all that he had, (which the king could not do if his alienation or gift should stand,) and therewith maintain him and his family; but the king shall not take any part of the said profits to his own use; and all this appears by the statute of *Prerog. Reg. cap. 10*, which was but a declaration of the common law item *Rex providebit*, &c. Et nota that the said words of Fitzherbert's

Our readers will form their own judgment how far we have advanced to the establishment of our position, that the authority of the sovereign in the appointment of guardian arises from his general character as *parens patriæ*. But assuming that we have correctly explained the origin of the jurisdiction, we think that the next question, how it passed into the hands of the Lord Chancellor, is not very material. The old writs of Ravishment of ward and *De recto de custodiâ* are returnable into the common law courts. They related to simple points fit for the decision of those courts. But after the guardianship of military tenure had been abolished, and the guardianship of socage tenure had ceased to be an object of desire, the required protection became one of a more complicated character, resting rather upon the conscience than upon definite or positive law, and involving considerations and proceedings, to which the principles and machinery of a court of equity were the best adapted. "Partaking as it does more of the nature of a judicial administration of rights and duties in *foro conscientiæ* than of a strict executive authority, it would naturally follow *eâ ratione* that it should be exercised in the Court of Chancery as a branch of the general jurisprudence originally confided to it." It seems to be agreed that during the prevalence of military tenures the chancellors took part in the management of the king's wards. Their ecclesiastical habits and character at once pointed them out as the fittest persons to perform the task. As soon then as a necessity arose for providing protection to other infants, the want was at once supplied by merely extending a jurisdiction which had been long in existence.¹

The general view then which we take of the history of this

Natura Brevium, 232, that the king is bound of right by his laws to defend his subjects, and their goods and chattels, lands and tenements, extend as well to non compos mentis as to an idiot." *Beverley's case*, 4 Co. 127 a.

¹ W. Fonblanque says, "Upon the whole, I submit that the general superintendence and protective jurisdiction of the Court in the case of infants is a delegation of the duty of the crown; that its general jurisdiction was not even suspended by the statutes of Hen. VIII., erecting the court of wards and liveries."—2 *Fonb. Eq.* 232. Mr. Justice Story says, "If it is not found to exist elsewhere, it seems to be a just inference, from the known prerogatives of the crown as *parens patriæ* in analogous cases, to presume that it rests in the crown."—2 *Story on Equity Jurisprudence*, 521.

authority of the Court of Chancery is very simple:—That the jurisdiction, the duty of seeing that justice is in all matters done to infants, has always been a part of the crown's prerogative, and that it was executed in certain particular cases under writs returnable in the common law courts, and in other cases under the¹ authority of the Court of Chancery; and that when there ceased to be any persons acting as guardians by legal right, the appointment of such persons became a necessary part of the functions of the court, with a view to the proper protection of the infant.

Having concluded our inquiry into the origin of this jurisdiction, we now come to the next question, namely, who may be wards in chancery. And first, as to the age. The age² of infancy and tutelage is an arbitrary matter, quite *juris positivi*, and fixed at different times in different countries. Full age in Holland is twenty-five, in Naples eighteen, in France, as to marriage, thirty. In Scotland, Sweden, England, in all the countries of which the law has been in any way founded on the old Saxon institutions, full age is twenty-one. "Among³ the ancient Greeks and Romans women were never of age, but subject to perpetual guardianship, unless when married, nisi convenissent in manum viri; and when that perpetual tutelage wore away, in process of time we find that, in females as well as males, full age was not till twenty-five years." In our own law children were formerly accounted of age for different purposes at different periods. "A male of twelve years old may take the oath of allegiance, at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor; and at twenty-one is at his own disposal, and may alien his lands, goods and chattels. A female also at seven years of age may be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage; and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal

¹ *Corporation of Burford v. Lenthall*, 2 Atk. 553.

² 1 Black. Com. 463.

³ *Ibid.*

discretion, and may choose a guardian; at seventeen may be an executrix, and at twenty-one may dispose of herself and her lands."¹ This is not the place for a detailed examination of these distinctions; but our readers will not pass them by without recollecting the effect which must have been produced upon their determination by the feudal rights and duties of fealty and wardship, and by the rules of civil law connected with marriage and executorship. No distinctions of this kind exist with respect to wardship in chancery. A female² may be a ward until she marries or attains the age of twenty-one years; a male, until he attains the age of twenty-one years.

A child may be made a ward of court, although guardians under other rights may be in existence. For instance,³ although there is a guardian by socage, or one appointed by the infant himself. We do not say that the court will take away the offices of other guardians; in what mode it will deal with their powers and authorities will be matter of discussion hereafter; at present we only observe that in spite of their existence this jurisdiction is always inherent in the Court of Chancery. The correctness of this position is proved by the celebrated case of *Mr. Wellesley Pole's children*, to whom a guardian was appointed, although their father, the natural guardian, was alive. Upon the appeal in that case from Lord Eldon's order for the appointment of a guardian by the court, it was argued that the father had an absolute right to the guardianship of the children in spite of the court's authority. Lord Redesdale remarked upon the argument in the following terms. "I apprehend it is impossible to say that the father has that absolute right which is contended for at the bar. What are the grounds on which the custody of the children is given to the father? First, protection, then care and education. Is it not clear, that if the father does not give that protection, does not maintain the child, the law interferes for the purpose of compelling the maintenance of that child? Is it not clear, that if the father cruelly treats the child in that manner, a court of criminal jurisdiction will interfere for the purpose of preventing that treatment? Is it to be said then,

¹ 1 Bl. Com. 463.

² *Mendes v. Mendes*, 1 Vez. 90; *Roach v. Gawan*, id. 160.

³ 1 Black Com. 462, n. (e).

there is no jurisdiction whatsoever in this country, that can control the conduct of the father in the education of his children? If a stranger was to enter into this house and hear what was argued on that subject, would it not strike him with astonishment that the law of this country should not have provided for such a case?"¹ Lord Manners,² in his judgment upon the same case, observes; "I do not understand, in looking at the office of guardian, how to distinguish between the testamentary guardian and the parent. The testamentary guardian, deriving his title from the right of the parent under the act of parliament, it is a continuation of the same trust, and, whether it is exercised by the parent or by the person delegated by him, is under the same control and liable to the same jurisdiction. The court certainly would regard the feelings of the parent; the court would be anxious that the affection of the children should not be estranged from their parent; it is a most important duty imposed on the person who may have the care of the children to impress that on their minds; but inasmuch as the court cannot correct the vices of the parent, the court is bound to protect the children against them. On that ground the noble lord (i. e. Lord Eldon) acted, and I think properly acted."³

The next point for attention is, that the infant must have property in order to be a ward of court. Lord Eldon alludes to this question in his judgment upon *Wellesley v. Duke of Beaufort*. "With respect to the doctrine that this authority belongs to the king as *parens patriæ*, exercising a jurisdiction by this court, it has been observed at the bar that the court had not exercised that jurisdiction unless where there was property belonging to the infant to be taken care of in this court. Now, whether that be an accurate view of the law or not, whether it is founded on what Lord Hardwicke says in the case of *Butler v. Freeman*, that there must be a suit depending relative to the infant or his estate, (applying however the latter words rather to what the court is to do with respect

¹ *Wellesley v. Wellesley*, 2 Bli. R. (N. S.) 129.

² *Id.* 146

³ This case appears to overrule Lord Eldon's dictum in *ex parte Mountfort*, 15 V. 447. "I have no doubt that in certain cases the court will upon petition without a bill appoint not a guardian, which cannot be during the father's life, but a person to act as guardian." That case was one of insolvency in the parent, not as in *Mr. Wellesley's* case of gross immorality.

to the maintenance of infants,) or whether it arises out of a necessity of another kind, namely, that the court must have property in order to exercise this jurisdiction, that is a question to which, perhaps, sufficient consideration has not been given. If any one will turn his mind attentively to the subject, he must see that this court has not the means of acting except where it has property to act upon." Thus Lord Eldon clearly understands that the infant must have property, although he thinks that the reason upon which this necessity is founded has not been subject to sufficient investigation. We are not aware that any minimum of property has ever been suggested as an infant's qualification to be a ward; but we apprehend, that an order cannot be taken for establishing wardship, except upon a bill, in which a statement is contained that the infant has some amount of property.

In discussing the origin of the jurisdiction we did not notice an argument which has been sometimes advanced, that if it were part of the authority of the *parens patriæ* it would be exercised as well for paupers as for those who have property. In meeting such an argument as this we must remember that all the proceedings of the court respecting infants, the suit, the appointment of guardians, the order for maintenance, the inquiry as to proper marriage, are proceedings in which expense must be incurred. By whom¹ is it to be met, if not out of the infant's estate? Courts of justice have existed in almost all countries by virtue, as it is admitted, of the sovereign authority, yet no one obtains justice except at the payment or at any rate the hazard of considerable costs. Where then property is considered necessary merely as a security for costs, such a necessity can supply no argument that the jurisdiction is not derived from the general authority of *parens patriæ*. The crown is bound to maintain the rights of infants as well as of adults; but we do not understand why one class has greater right than the other to obtain such protection gratuitously.²

However it is not merely in respect of costs that property is required. Maintenance is to be ordered. Out of what

¹ Story, Eq. Juris. 527.

² There is truth in the answer, which was made to a person, who, boasting of the English judicial system, said that the courts were equally open to all. "Yes," it was replied, "like a coffee house, to all who can pay."

fund is it to come? It is at once manifest that if the court is to give the maintenance out of any public fund, or to regulate it when supplied out of a public fund by some other authority, the court will be interfering with an essential part of the administration of the poor laws.

On the whole, then, we think it may be said that all persons under age and having property, except married females, may be wards in chancery.

The next question to be determined is, what proceedings are required in order to make an infant a ward of court? Justice Story says, "Properly speaking, a ward of chancery is a person who is under a guardian appointed by the Court of Chancery."¹ The learned judge must of course be supposed, in using the words "ward of court," to refer to the full protection which belongs to persons who stand in that character; and, if his position is correct, the proposition must be construed to mean that every person who is in the custody of such a guardian will be protected by the process of contempt which the court employs in these cases. Yet guardians are repeatedly appointed by petition; and still we are unable to find any instance in which the guardian having been appointed without suit, and upon mere petition, the marriage of a female infant has been punished as a contempt. Since 1696, when in the case of Hampden a guardian was ordered upon petition and without suit, an order to that effect has been frequently made. The next step was to maintenance without suit. As late as 1792² doubts were entertained upon the propriety of this order, which was made in one case, because the infant was clearly entitled to a definite estate of definite value; in another, because an undertaking was given to file a bill. The practice³ however now is, to make an order for maintenance without suit, when there is some sufficient estate which clearly belongs to an infant. In *Ex parte Mountfort*, Lord Eldon observed, "Lord Rosslyn, in the Duke of Newcastle's case, made the order for a guardian, but stayed the payment of maintenance until a bill should be filed, and that was followed

¹ Story's Eq. Jurisp. 535.

² *Ex parte Salter*, 2 Dick. 772; S. C. 3 Bro. C. C. 501. These reports contain the mention of several authorities.

³ *Ex parte Watkins*, 2 Ves. 470.

by Lord Alvanley. I have taken the course to be, not to do it upon petition except in very special cases ; as where there is a specific fund for maintenance, or the property is very small ; but that as a general rule, if the infant had a 100*l.* per annum, a bill should be filed." If, however, it is conceded that an infant may obtain maintenance upon petition, it by no means follows that, without a bill being filed, the full powers of the court will be exercised for his benefit. Certainly no receiver will be appointed over¹ his estates. The passage of Lord Eldon's judgment, quoted above, continues in the following words, "A very serious question would arise whether, if the person so appointed should embezzle, I should have jurisdiction to commit him to the Fleet." The question put by Lord Hardwicke in *Butler v. Freeman* is, "Whether² a suit is necessary, if the father be dead, to entitle the Court of Chancery to jurisdiction to punish for contempt in marrying an infant? or whether it cannot be done merely on petition?" Sir Thomas Jekyll seems to have thought that the right to commit for taking part in the improper marriage of a ward of court arises out of a suit, by reason of the publicity of the proceedings, and the notice consequent upon them, as upon a *lis pendens*.³

The general result of the authorities appears to be, that the court will not protect the infant by process of contempt, unless a bill be filed. The custody of the infant's person and property is in this way brought completely under the direction of the court ; and, it being the duty of the court to maintain the infant in every possible advantage which the law will allow, and to act for his benefit by its own orders, any person who withdraws the infant from proper custody, injures his estates, disposes of him in marriage without the court's special direction, or disobeys any order which has been made respecting him, is guilty of one of that class of contempts by which obstructions are offered to the court's administration of justice.⁴ The inference, then, which we draw is, that in order to constitute a ward in chancery, properly so called, a bill must be

¹ *Ex parte Mountfort*, 15 Ves. 448 ; *Anon.* 1 Atk. 489.

² *Butler v. Freeman*, 1 Amb. 304.

³ *Herbert's case*, 3 P. W. 116 ; see *Goodall v. Harris*, 2 P. W. 562.

⁴ See 2 Story's *Eq. Jurisp.* 535 ; *Newl. Pr.* 130.

filed. We may add, that as soon as ever the bill is filed, the wardship commences.

We will now suppose the bill to have been filed, and the infant to have been made a ward of court, and we will endeavour to explain the mode in which the protection of the court is given. The first consideration is the guardianship. There has been a curious variety in different systems of law as to the enjoyment of this office. The guardian in chivalry¹ was the lord of whom the lands of the ward were holden. The guardian in socage² was the next friend, or, as Littleton explains the word, "next in blood to whom the inheritance could not descend." And it seems that, according to the common law, no³ other person than the father could be guardian during the father's life. Where the son⁴ was heir to his mother, the father was termed guardian by nature. A custom as to guardianship prevails in the City of London, where the mayor⁵ and aldermen are guardians of every orphan within the city, that is, where any one free of the city has died, leaving an orphan within age and unmarried.

Our statutory enactments⁶ have all tended to secure the authority of the father, partly to himself, as long as he lives, and partly after his death to the persons whom he appoints. The *legitima tutela* of the civil law devolved on the relations of the minor, both *agnati* and *cognati*, according to the order in which they would succeed to the minor in case he died intestate.⁷

The tutor in the law of Scotland is the next male agnate, or, if there are many male agnates equally near, is the one who is heir at law.⁸ By the New York revised statutes, the guardianship belongs to the father; if there is no father, then to the mother; if there be neither father nor mother, then to the nearest and eldest relative of full age not being under any legal incapacity; and, as between relations of the same degree of consanguinity, males are preferred.⁹

¹ Com. Dig. iv. 378.

² Co. Lit. 88 a.

³ Co. Lit. 84 a.

⁴ Com. Dig. iv. 381.

⁵ Com. Dig. iv. 385.

⁶ 4 & 5 Ph. & M. c. 8; 12 Car. 2, c. 4.

⁷ 3 Burge's Com. Foreign and Colonial Law, 935.

⁸ 3 Burge's Com. 936.

⁹ Ibid. 937.

The laws of different countries have varied to an equal extent as to the authority by which a guardian is to be appointed. The power of making the appointment rested, under the old Roman law, with the prætor or provincial resident—under the civil law it rests with the judge within whose jurisdiction the infant's place of domicile is comprised—in Holland with the Orphan Chamber. Mr. Burge gives the following account of the appointment of a guardian under the *coutume de Paris*.¹ "The judge, upon the request of the minor's relations or friends, or *ex officio*, directs a council or meeting of the relations and friends of the minor for the purpose of making choice of a tutor and a subrogated tutor. That council consists of the paternal and maternal relations not less than seven in number, and if there be not that number of relations, the neighbours and friends are called in. The relations, who have been assembled under this summons, then take an oath that they will nominate the person whom they consider the most competent and proper to discharge the duties of tutor and subrogated tutor. They then proceed to nominate the persons to these offices, and when they are approved of by the judge, they take an oath well and faithfully to discharge their duty."

In all these systems we find certain definite rules which bind down the courts of justice in the exercise of this jurisdiction. When however we examine the proceedings of the Court of Chancery, we find that the whole is exclusively left to the discretion of the court. If sufficient reason can be found, the claims of guardians by common law or testamentary, and even of parents, will be disregarded. A doctrine seems formerly to have prevailed, that although the court would interfere where there was a guardian by common law, yet if the guardian was appointed under the authority of a statute, the court could not remove him.² However this distinction was denied by Lord Macclesfield,³ whose opinion has continued to prevail until the present time.

That noble lord in *Beaufort v. Berty*, to which we have just referred, laid down the principle of the jurisdiction in words capable of great latitude. His lordship observed that "*pre-*

¹ 3 Burge Com. 939.

² *Foster v. Denny*, 2 Cas. Ch. 237.

³ *Beaufort v. Berty*, 1 P. W. 703.

venting justice was to be preferred to *punishing justice*; and that he ought rather to prevent the mischief and misbehaviour of guardians, than to punish it when done. That if any wrong steps had been taken, which might not deserve punishment, yet if they were such as induced the least suspicion of the infant's being like to suffer by the conduct of the guardians (as there was in that case), or if the guardians chose to make use of methods that might turn to the prejudice of the infant, the court would interfere and order the contrary." Such is the principle of the court with respect to interference. Whether it will be carried into effect by the appointment of some other guardian, Sir John Leach seems to have entertained a doubt. "The court," he said, "will not make an order to remove a testamentary guardian; but a proper case being made, the court will refer it to the master to appoint some other person to superintend the maintenance and education of the infant." The distinction, if valid, would seem to be very fine; for whether the guardian is removed from his office, or the children are removed from the guardian, the practical effect, we need hardly say, is precisely the same. Lord Hardwicke says, "The court¹ sometimes, though seldom, removes a testamentary guardian." Other authorities² may be quoted to the same effect, but the instance of Mr Wellesley, in which a guardian was appointed against the father himself, is in its nature the strongest instance that can arise, and is a sufficient precedent for the court's taking the most determined steps against any person who violates his duties. The jurisdiction, however, is one which the court will exercise with the utmost scruple and delicacy. The separation of child from parent will always be regarded as in itself an enormous evil, one which ought never to be encountered except upon the supposition that it will clearly be overbalanced by the consequence of leaving them in their natural state. That a father entertains religious opinions at variance with those of the established church, for instance, that he is a Baptist or Unitarian, is no ground at all for taking

¹ Robet v. Garvan, 1 Vez. 160. See Tombes v. Elers, Dick. 88.

² See Eyre v. Shaftesbury, 2 P. W. 107; Morgan v. Dillon, 9 Mod. 141, where the court says, "At common law there are four sorts of guardians and every one of them removable."

from him his children.¹ On the contrary,² the present Lord Chancellor has recently expressed a strong opinion, that effect should be given to the evident intention of a deceased father, that his son should be educated in the Roman Catholic faith.

The judgment in *Shelley v. Westbrook*³ will lead us to suppose that even should certain abstract opinions entertained by the father have a direct vicious tendency, still the mere maintenance of those opinions will not be a sufficient ground for interference with the father's authority. The matter must not rest upon mere probability. The principles must have been called into activity and manifested in the conduct of life. "I consider this," said the Lord Chancellor in that case, "as a case in which the father has demonstrated that he must and does deem it to be matter of duty, which his principles imposed upon him, to recommend to those, whose opinions and habits he may take upon himself to form, that conduct in some of the most important relations of life as moral and virtuous, which the law calls upon me to consider as immoral and vicious; conduct, which the law animadverts upon as inconsistent with the duties of persons in such relations of life, and which it considers as injuriously affecting both the interests of such persons and those of the community. I cannot therefore think that I should be justified in delivering over these children for their education to what is called the care to which Mr. Shelley wishes it to be intrusted."

We may here allude to the attempt which some benefactors have made to dispose of the guardianship of the children to whom their bounty is directed. In *Ex parte Hopkins* the attempt was made under those circumstances which would be considered very favourable to its success. Mr. Hopkins was a merchant of considerable wealth, who, having no family of his own, had received into his house his nieces, the daughters of his brother. On his death he bequeathed to them large legacies, and, although he did not absolutely direct that they should be brought up by any particular persons, he was reported by the executors to have said that he never intended them to be educated by their father and mother, since they

¹ *Lyons v. Blenkin*, Jac. 245.

² In the case of Mr. Talbot presumptive heir to the Earl of Shrewsbury.

³ See Jac. 245.

would, as his expression was, learn nothing there but low life. The question decided by Lord Hardwicke had reference to the form of proceeding which the father ought to institute with a view to obtain possession of his children, but in the course of his judgment he made the following remark. "It cannot be conceived that, because another thinks fit to give a legacy, though never so great to my daughters, therefore I am by that means to be deprived of a right which naturally belongs to me, that of being their guardian."¹ And in *Powel v. Cleaver*, Lord Thurlow observed in the same spirit, "It is nowhere laid down that the guardianship of a child can be wantonly disposed of by a third person."

In no case, with which we are acquainted, has the mere poverty of the father been considered a sufficient ground for withdrawing from him the care of his children. But by his own conduct he may waive his parental authority. He may accept a legacy, left to him upon the condition that he does not interfere with the children's custody and education.² Or where a particular person has been pointed out in a will as guardian to his children, he may allow them for many years to continue under the care of that person, and, while under that care, to form all connexions, friendships, habits and expectations, and to receive all the pecuniary benefits, to which the will entitled them. Under circumstances of this kind he will not afterwards be allowed to break in upon the course of their education, to introduce a system which in the opinion of the court is far less favourable to them; to substitute the habits of poverty and embarrassment for those of such fortunes as will hereafter become their own, or to connect them with low society, which will not be suitable to their prospects nor after the habits of past years to the state of their minds. However, a case of this kind is not one in which the association of father and child is prevented on account of the father's poverty: it is one in which the father has in the first instance surrendered his right, has allowed his children to be so educated as to contract notions and habits and feelings different from his own, and has thrown upon the court a duty to be dis-

¹ *Exparte Hopkins*, 3 P. W. 156. See *Lyons v. Blenkin*, Jac. 258.

² *Colston v. Morris*, Jac. 237. See *vide* as to his power of repaying the legacy *De Manneville v. De Manneville*, 10 V. 63, 4,

charged for their benefit, of preserving to them the full advantages, pecuniary, moral and intellectual, which have arisen from the bequests on the one hand, and on the other from their education in superior society. Lord Eldon gives the following account of Lord Thurlow's view upon this subject. "Lord Thurlow¹ took upon him the jurisdiction on this ground, that he would not suffer the feelings of the parents to have effect against that duty, which, upon a tender, just and legitimate deliberation, the parent owed to the true interests of the child; and his lordship separated the person of the child from the father; always taking care, that the separation shall not have a greater effect than the cause requires; and that the intercourse shall be as frequent and full as the case requiring the separation will permit."

The death of the father produces this effect, that the court can select a guardian with greater freedom than if he were still alive; particularly if he has not appointed any testamentary guardian. For instance, where, after the father's death, a person settled upon an infant a considerable fortune upon condition of his being her guardian, it was referred to the master to consider whether it would be proper to appoint the settlor to be guardian to the infant, taking into consideration the effect of the deed of settlement.²

Throughout the whole course which is pursued upon this subject the Court of Chancery proceeds upon principles quite different from those upon which a court of law deals with the authority of guardian. The court of law proceeds only upon a writ of habeas corpus, and is regulated by principles which are equally binding upon the Court of Chancery when it acts upon that writ. Considerations like those which were suggested in the case last mentioned could not affect the decision of a common law court. In *Rex v. Isley*,³ the children in question had long lived with their grandfather and grandmother, who had come from America at the father's request for the very purpose of taking them in charge. It was very probable that their habits, feelings, and opinions had been formed by the society by which they were then surrounded, but the common law court, paying no attention to points of

¹ *De Manneville v. D.* 10 V. 64.

² *Pagnani v. Selwyn*, Jac. 268.

³ *Rex v. Isley*, 5 Ad. & Ell. 442.

this kind, gave effect to the legal right. In truth the proceeding upon habeas corpus is a mere question of personal liberty. If the child is of the age of discretion, he may exercise it by choosing where he will go. If he is not of such an age, he is placed in the legal guardianship, in which situation the law presumes that his liberty is secured. "When¹ an infant," says Lord Denman, "is brought before the court by habeas corpus, if he be of an age to exercise a choice, the court leaves him to elect where he will go. If he be not of that age, and a want of discretion would only expose him to dangers or seductions, the court must make an order for his being placed in the proper custody." Justice Coleridge observes "where² the person is too young to have a choice, we must refer to legal principles, to see who is entitled to the custody, because the law presumes that where the legal custody is no restraint exists."

In the selection of a guardian the Court of Chancery is bound by no strict legal rules, and pays attention to the wishes as well as the interests of the infant. Having for its object his general welfare and comfort, it will exercise the jurisdiction by placing him under the care and superintendence of those who are most likely to treat him with parental attention, and to promote his present comfort as well as his permanent happiness. The necessary inquiries are instituted before a master of the court. To him several persons are proposed, amongst whom he selects the one whom he considers on the whole the fittest, and recommends him in his report. On the confirmation of the report the appointment is complete. We see therefore that the court, throughout all its proceedings upon this branch of jurisdiction, confirms the authority of the parent, so far as it can be admitted consistently with the infant's welfare. The infant is the first object; next come the claims of parents, relations, and connexions, according to their different degrees of proximity, and their several characters and fitness for the task; and these claims will be admitted in whole or in part, or else be entirely rejected, as the court in exercise of a wide discretion may deem most beneficial to the infant.

It may be observed of all the guardianships at common law

¹ *Rex v. Greenhill*, 4 Ad. & Ell. 640.

² *Id.* p. 643.

that they are authorities coupled with interests. Guardian in socage may bring his action and avow in his own name, may make leases during the minority of the infant, and may grant copyholds even in reversion as dominus pro tempore. Testamentary guardians are of the same character. In all the guardianships of this kind survivorship prevails. But the same characteristics do not belong to the office of guardian by appointment of the Court of Chancery. We see no reason for thinking that the court can confer any estate upon the person appointed guardian. He is an officer and only an officer. If he has the care of the estates, the tenants may be ordered to attorn to him, and after attornment may be incapable of disputing his title as landlord; but he has not by virtue of his appointment an interest similar to that of a guardian in socage. Nor is there any necessity that the two offices should be precisely the same in character. Guardian in socage acted under no immediate direction or superintendence of a court. When his rights were interfered with, he could have recourse to an action; but, generally speaking, he exercised, in respect of his rights as guardian, the same independent judgment which belonged to him in respect of rights which were strictly his own. A guardian appointed by the court acts ministerially under the court's immediate direction. With regard to survivorship, the question cannot often arise, because the court rarely appoints more than one guardian; but where two, or more than two, have been appointed, and one has died, an application to the court has been considered necessary.¹

Before we quit this branch of the subject, it will be convenient briefly to state the different modes in which the court compels the guardian to perform his duty. In the first place he is compelled to account for all the infant's property which comes into his hand, or to give security under any circumstances in which there is a prospect of danger; the recognizances which he enters into with reference to the ward's marriage may be forfeited; and he may himself be removed from his office, or committed. We shall show in the course of our observations, that on occasions, in which the guardian rather

¹ 1 Grant's Ch. Pr. 423.

needs advice than deserves punishment, the court will supply him with all proper directions for the custody, maintenance, or education of the infant.¹ But it seems to us, on looking at the authorities to which we have already referred, that the court will exercise no compulsory powers over a guardian, except upon the institution of a suit. Where the court is invested by the legislature with the power to make orders on petition, it will use the process of contempt to enforce the particular orders that are made. The legislature have determined that in such peculiar cases the court can act more beneficially by petition than by bill. But there is no analogy from these cases to the orders for guardianship and maintenance, which are made upon petition only. These orders are made, not in obedience to any statute, but in conformity with the notions which the court entertains of the general convenience of suitors. It by no means follows that the issue of the process of contempt, interfering as it does with the liberty of the subject, can in the absence of any statute be justified by mere convenience. We know that in matters of this kind the court always acts with the utmost scruple; and when we find no authority for the use of its process in such cases, we are fortified in our opinion that process will not be issued, except upon that more deliberate consideration, which takes place after the institution of a suit.

¹ 2 Story, Eq. Jurisp. 528.

² See *Butler v. Freeman*; *Ex parte Mountford and Herbert's case*, ub. sup.

C.

(To be continued.)

ART. V.—PRACTICAL POINTS IN CONVEYANCING.¹I. *Liability of a Purchaser to see to the Application of the Purchase Money.*

THE general rule is, that if an estate be devised to a person in fee, charged with debts and legacies generally, a purchaser or mortgagee from the devisee need not see to the application of the purchase money. This is on the ground that the debts should be first paid, but if a purchaser were required to ascertain that all the debts were paid, no estate so devised could be sold except under a decree in chancery; and if the rule necessarily is, that a purchaser need not ascertain, before paying his money to a devisee, that the testator's debts are paid, it follows, that he need not make any inquiry as to the legacies, which are only a secondary charge.

The application of the general rule does not appear to depend upon the time when the sale is made by the devisee, whether immediately or a considerable time after the decease of the testator. The mere circumstance, that a considerable period has elapsed since the testator's death, has not been held in any case we are aware of, a sufficient ground to infer that the purchaser had notice that all the debts were paid, and consequently that he should have required proof of the payment of the legacies.

Several cases have recently occurred involving the consideration of this important rule, and we now propose to state them shortly with a few observations.

In *Johnson v. Kennett*¹ the estate was devised to the son in fee, subject to the debts, an annuity to the widow and legacies to the daughters. The son was also entitled to the personal estate. Two or three years after the testator's death, the son and his wife levied a fine and conveyed the estate, without reference to the debts and legacies, to uses to bar dower. The son then sold the estate in lots to several purchasers. The conveyance recited the will, the conveyance and fine, the contract to sell, and an agreement to give to the purchaser a bond of indemnity against the legacies; it was not recited that the debts were paid. In some of the deeds the widow joined and released her annuity *pro tanto*. Each purchaser had a bond of indem-

¹ 6 Simf. 384.

nity; some of the bonds mentioned the legacies, and others were mere general bonds, but in none was there any notice taken of the debts. The daughters filed a bill against the purchasers and the assignee of the son. The bill stated that the son had paid the debts, and that the legacies were unpaid. The answers did not deny that the debts had been paid, and stated the belief of the purchasers that the legacies were unpaid. It was held by the Vice-Chancellor that the estates were still charged with the legacies in the hands of the purchasers, for they dealt with the son, not as a trustee for the widow and daughters, but as the owner of the estate, and they were aware that the legacies were unpaid, and did not represent that they were told or supposed that the debts were unpaid. But this decision was reversed upon appeal by Lord Lyndhurst, Chancellor, upon the ground that the rule applies to the state of things at the death of the testator, and if the debts are afterwards paid and the legacies alone are left as a charge, that circumstance does not vary the general rule; and in the particular case there was no charge in the bill that the purchasers knew that the debts were paid, and the taking of the bonds of indemnity was held to be unimportant.¹ This case shews the importance of a purchaser not being over cautious; for it is obvious that the taking of the bonds of indemnity was the main argument against the purchasers; and the practical inference seems to be, that, in case of a purchase or mortgage under such a devise as we are now considering, there should be no recital or inquiry whatever as to either debts or legacies.

In the case of *Braithwaite v. Britain*,² a testator devised real estate to W. B. his heirs and assigns, subject nevertheless to and charged with the payment of £3800 to the executor of the will, and that sum was afterwards charged by the testator with the payment of his debts and legacies. The executor afterwards released W. B. from the payment of the sum of £3800, but the release did not contain any evidence that the sum had been actually paid. The devisee, W. B. then mortgaged the property without any notice of the charge upon it, and it was held that the mortgagee's security was subject to that charge, or, in other words, that he should have seen that it was paid before he advanced his money to the devisee.

¹ 3 Myl. & Ke. 624.

² Keen, 206.

But this it is clear was not holding that the mortgagee was bound to see to the payment of the debts and legacies charged on the sum of £3800, on the contrary, the Master of the Rolls said that, if that sum had been actually raised and paid to the executor, the mortgagee would not have been bound to have seen to the application of it.

The next case, *Eland v. Eland*¹, more nearly concerns the rule we are considering. There the devisee of real estate charged with debts and legacies mortgaged it for £1000, and covenanted against incumbrances "save and except the legacies given by the will." There was no recital that the debts were paid, and the fact was that debts remained unpaid when the bill was filed. But the exception in the mortgage deed of the legacies was held to be a new and substantive charge of them upon the estate by the devisee, and that the mortgagee's security was subject to the amount of the legacies. And to this decision we see no objection, and the general rule was expressly recognized and referred to by the court, and the case was decided upon its own peculiar facts and circumstances. The main question was whether the creditors had any claim upon the fund held to be excepted out of the mortgage, and it was decided that they had the first claim, and that, subject to their claim, the fund belonged to the legatees.

In a case which lately occurred in practice, there were first two or three mortgages by a devisee in fee of real estate charged with the payment of debts and legacies generally, in which mortgages there was not any reference whatever to the debts or legacies. Then in 1824 there was a transfer of the existing mortgage debts with a further charge, in which there was a recital that all the debts and legacies, except the legacy to Dorothy Monk, had been paid. It had been assumed that the legacy to Dorothy Monk had failed, by her dying under twenty-one, but it was evident that that was a mistake, and that she had taken a vested interest in her legacy. It was contended on the part of a purchaser, that he was entitled to have proof that the legacies were paid as stated in the recital, and that a release should be obtained for the legacy given to Dorothy Monk. The first part of the demand was resisted; it was admitted that if the recital had simply been that the debts were

¹ Beavan, 235.

paid, then that might have thrown upon the purchaser the onus of seeing that the legacies were paid, for such a recital would perhaps have been held to be tantamount to a declaration by the devisee that the legacies were become the primary charge upon the estate; but it was contended that the statements in the recital in question could not be separated, and that as it was clear the purchaser could not require proof that the debts were paid, he could not, on the assumption that that part of the recital was true, proceed to require proof that the legacies were paid. His right to proof that the legacies were paid, it was urged, depended entirely upon the fact that the debts were paid, as to which the general rule precluded him from inquiring. The only ground upon which a recital that debts are paid can be said to make legacies the primary charge is, that it is an admission by the devisee in favor of the legatees, by which a purchaser claiming under the devisee is bound: but this reason of course did not exist in the case we are now considering. We apprehend it is not strictly correct to say that it is on the ground of "*notice*" that a recital that debts are paid makes legacies the primary charge; for such a recital may or may not be true and can in very few cases be proved; but such a recital is certainly an admission by the devisee that the legacies are become the primary charge. But upon the whole we are inclined to think that a mere statement in a conveyance by a devisee that the debts are paid cannot be rightly held to impose upon the purchaser the onus of seeing that the legacies are paid; for, as we have already said, such a statement is only an expression of an opinion and not a declaration of a fact. And suppose a purchaser were to act upon such a statement as a fact, and were to pay the whole of his purchase money to legatees, and afterwards debts were to appear, would not the creditors have ground to contend that the purchase money had been wrongly applied, and that the purchaser must be responsible for the misapplication? As to the charge of debts and legacies, the testator makes the devisee a trustee and gives him, by implication, full power to sell and receive the purchase money, and a purchaser should not be implicated in the trust. We think the rule was rightly stated by Lord Lyndhurst, C. in *Johnson v. Kennett*, "the rule applies to the state of things

at the death of the testator ; and if the debts are afterwards paid, and the legacies alone are left as a charge, that circumstance does not vary the general rule.”¹

II. *Covenants for Title.*

Where an estate is devised to trustees upon trust to sell, and with a direction to apply the money in payment of debts, and afterwards to pay the residue among certain persons, it is the practice of conveyancers to make all the cestuis que trust, whose shares of the purchase-money are in anywise considerable, join in covenants for the title, according to their respective interests.² It is admitted by Sir Edward Sugden that this practice is contrary to the rule of the Court of Chancery ; and we think he should have added, contrary to the decision of that court in the case of *Wakeman v. The Duchess of Rutland*.³ There the devise was upon trust to sell, and to pay such part of the testator's debts and legacies as the personal estate might be deficient to satisfy, and then to pay the interest of the residue among three persons in equal shares, during their respective lives, with remainders over to their respective issue. The Lord Chancellor decided that a purchaser could not require the cestuis que trust for life to covenant for the title, and he grounded his decision upon this,—that if the cestuis que trust entitled to the residue could be compelled to covenant for the title, according to their respective interests, so every simple contract creditor, who was to receive payment out of the purchase-money, would be also a necessary party ; and so no conveyance could be made of an estate so devised until all the creditors were ascertained : and this decree was affirmed by the House of Lords. If then debts are payable out of the purchase-money, it seems clear that parties entitled to the residue need not covenant for the title ; but it is said by Sir Edward Sugden, where the money to arise from a sale is absolutely given to two or more persons, “ they are substantially owners of the estate, and must accordingly covenant for the title.”⁴ There is not, however, any clear authority for this ; and it has been observed,⁵ “ that

¹ 3 Myl. & K. 631.

² 2 Sug. V. & P. 453, 10th edit.

³ 3 Ves. 232 and 504.

⁴ 2 Sug. V. & P. 454.

⁵ Hayes's Concise Conveyancer, p. 109, note.

the practice is open to much remark ; each of the cestuis que trust is clearly entitled, as against the rest, to insist upon an immediate sale ; and it would seem that the completion of the sale ought not to depend on the concurrence of the cestuis que trust, who cannot be compelled, and may be incompetent to covenant." There is certainly much force in this. The law allows a testator to vest his real property in trustees, with power for them to sell the same and to receive the purchase-money. There can be no doubt this is a valid disposition. He may then direct that the purchase-money shall be distributed among certain persons ; and his principal object in making such a devise probably is to simplify the sale by making the necessary conveying parties as few as may be ; and it seems unjust that this object should be defeated by the practice to which we have just alluded. No doubt in such a case the cestuis que trust are substantially owners of the estate ; but unless they all concur and exercise the power which the law gives them of electing to retain the property unsold, the practice of conveyancers, which we are now considering, is a daring infringement of a testator's right to vest the disposition of his property in what persons he thinks proper ; and we doubt whether such practice would be affirmed by the Court of Chancery : and, indeed, we have been informed that a decision has been made against it in the Master's office.

A question lately arose in practice on such a devise as we have just adverted to, different from the point we have considered above. The devise was to sell as soon as conveniently might be, with full power to give a receipt for the purchase-money, with a direction that the sale monies should be divided among five persons named—all competent and free from disability. The sale was delayed for upwards of ten years, and then the trustees contended that it was unnecessary that the cestuis que trust should join in the conveyance or covenant for the title. But it was objected, first, that the purchaser was entitled to covenant for title from the cestuis que trust according to the practice stated above ; and, secondly, that he was entitled to have the sale confirmed by the cestuis que trust, on the ground which we shall now state.

The sale being directed to be made as soon as conveniently

might be, ought, according to the construction put upon those words, to have been made within a year or two. The trustees having thus apparently failed in their duty, the presumption was, that as prudent men they had delayed the sale by the direction or consent of the cestuis que trust; and, if so, that was an election by them to retain the property unsold for a time at least. Consequently the purchaser was entitled to the concurrence of the cestuis que trust, in order that he might be assured that the sale was not made against their election to retain it unsold. Of course the ground of this objection was, that the delay of the sale was tantamount to express notice that the cestuis que trust had interfered to restrain the sale. If in such a case it appeared that some of the cestuis que trust were infants or under other disability, and so incompetent to exercise any election, it might be contended that the delay of the sale, unless satisfactorily accounted for, constituted such a breach of trust as to destroy the power given by the will, and so to render it unsafe for the purchaser to rely upon a conveyance from the trustees alone. It is easy to see, that though it might be the intention of the testator that the trustees should have power to sell immediately after his decease, yet that he would not have given them power to retain the estate and to sell when they thought proper. However this may be, it is plain that the power of the trustees depends upon the intention of the testator as expressed in his will; and if that intention be not complied with, the power does not exist; and it matters not that the sale proposed to be made by the trustees is in fact a more beneficial one than that intended by the testator, for the simple answer is, "*Cujus est dare, ejus est disponere.*"

The practical inference from this is, that in creating such a trust, care should be taken to give the trustees a discretion to defer the sale if they think proper.

III. *A Power to appoint Land enables the Donee to direct a Sale.*

A testator devised all his real and personal estate to trustees absolutely, upon trust to pay the income to his daughter and only child during her life, and after her decease upon

trust to convey his said real estate, and to pay and deliver his said personal estate unto such child or children of his said daughter, as she his said daughter should by any deed or deeds, or by her last will and testament in writing for such estate and estates direct, limit, or appoint. There were five children of the daughter, three sons and two daughters. By her will, after reciting the power, she directed the trust premises to be conveyed to her sons, George and William, their heirs, executors, administrators, and assigns, upon trust nevertheless to sell the same, and to stand possessed of four-fifths of the money for themselves and her son John and her daughter Hannah; and to stand possessed of the remaining fifth for her daughter Sarah during her life, and after her decease for her the said testatrix's three sons in equal shares. The testatrix directed that the receipts of her sons George and William should be good discharges.

It is clear, from the case of *Kenworthy v. Bate*, 6 Ves. 793, that the daughter had power to direct the land to be sold, and the money to be divided, and the only question was whether the purchaser should be satisfied with the receipt of the trustees, George and William, and it was thought they should, for the testatrix need not have given any thing to her other children, and with respect to what she did give them, she might impose the condition that they should receive their shares through her sons, George and William. So it may be said the testatrix could have given the whole absolutely to George and William, and, so far as the purchaser was concerned, she must be considered as having done so.

IV. *Rights of a Mortgagee against a Tenant.*

We lose no time in directing the attention of our readers to the novel and alarming doctrine propounded by Lord Denman, C. J., in the late case of *Evans v. Elliot*, 9 Adol. & Ellis, 342. In that case there was a common mortgage for a term of 1000 years; and afterwards the mortgagor, remaining in possession, demised the premises to a tenant for a term of eleven years. The interest having become in arrear, the mortgagee, on the 3d of May, 1832, gave the tenant notice of the mortgage, and not to pay any rent then due, or thereafter

to grow due, to the mortgagor; but notwithstanding this notice, the tenant paid the rent which became due at Michaelmas, 1832, to the mortgagor, and subsequently the executors of the mortgagee distrained for the same rent. The court held that the notice given by the mortgagee to the tenant was not sufficient in itself to constitute a tenancy between them, and so to cause the tenant to hold of the mortgagee, and consequently that the distress made could not be sustained. But Lord Denman, in delivering the judgment of the court, but expressly speaking for himself only, said "it must, I think, be admitted, that a mortgagee may so bind himself by his own conduct as to be precluded from treating the mortgagor's lessee as a trespasser; what conduct might amount to a recognition seems to me to be rather matter of evidence than of law; but I confess that *Doe dem. Whitaker v. Hales*,¹ appears to me, though doubted by my brother Littleale in *Doe dem. Rogers v. Cadwallader*,² to be well decided. I am by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold, from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises as before the mortgage, and to lease them out exactly as if his property in them continued." It is very obvious that this opinion of the learned chief justice cannot be supported; the results which would plainly flow from it would infallibly destroy the whole system of mortgaging which at present prevails. So long as a mortgagee receives his interest and is satisfied with his security, it is the constant practice for him to permit the mortgagor to continue the apparent owner of the premises as before the mortgage, and to lease them out exactly as if his property in them continued. Now if from such a practice a court were to hold that the tenant or lessee of the mortgagor could not be evicted or disturbed by the mortgagee, the mortgagor might take a large fine, and demise the property for a term of ninety-nine years, at a peppercorn rent, and thus entirely destroy the security he had granted.

The doctrine which we oppose is, it is plain, grounded on a mere equitable notion on the supposed hardship which a tenant

¹ 7 Bing. 322.

² 2 Barn. & Adol. 473.

coming in under a mortgagor may experience from being treated as a trespasser by a dormant mortgagee, so that if the doctrine could be sustained at all, its proper place would be the Court of Chancery, and it is remarkable that in the next paragraph of the same judgment in which it was propounded, Lord Denman referred to the error of his great predecessor Lord Mansfield, of supposing that the right to recover in ejectment could depend on any thing but the legal right of possession. But in point of fact there is no ground in the case supposed for the interposition of chancery, for there is no hardship on the part of the tenant which gives him any claim for its interference against a mortgagee. The title to land in this country does not depend upon the apparent ownership of it, which the doctrine seems to assume, and if a tenant or other party is so incautious as to expend his capital upon the faith of a lease granted by a mere apparent owner, without any inquiry as to his real title, he cannot complain if he finds that he has been building upon the sand.

It must be observed that we entirely assent to the decision in the case *Evans v. Elliot*, for it is clearly in accordance with the true principles of tenure. But this case gives further confirmation to the observations we made in a former number, as to the inconveniences arising from the anomalous relation between a mortgagor and mortgagee, and we would again urge it upon the attention of conveyancers to devise some better system of mortgaging, than that which now prevails, by which the present evils might be avoided. We may say that we have not discovered any reason why the plan we proposed in the article just referred to might not be in substance advantageously adopted.

V. Affidavit—Declaration.

Our readers are aware that by a recent *act*¹ it has been enacted that it shall be lawful for any justice of the peace, notary, public or other officer, now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to the act annexed, and that if any declaration so made should be false or untrue in any material particular,

¹ 5 & 6 W. 4, c. 62, s. 18.

the person wilfully making such false declaration shall be deemed guilty of a misdemeanour.

It is often found necessary to exercise the power given by this enactment in making out a title to property sold, and the enactment has certainly been found very useful. But a question may arise whether a purchaser is in all cases bound to rely upon a voluntary declaration. It is plain that a title may rest entirely upon a fact which depends simply upon living evidence, which can only be fixed and rendered permanent by a declaration under this act, unless a bill be filed to perpetuate the testimony.

The following case lately occurred. Real property belonging to a female in a humble station of life was upon her marriage settled upon herself for life, with remainder to her children in fee. There was a child born, which only lived a few hours, but who of course took a vested estate in fee under the settlement. Then the mother died, and the dates placing the case under the old law, the eldest brother of the husband claimed the property as heir at law. It was stated that the only persons who could speak to the child having been born alive were a surgeon and the nurse, and their declaration under the act referred to was offered.

Such declarations may also be of great importance with respect to the identifying of property, and it seems to be the opinion of eminent conveyancers that a purchaser is bound to rely upon them, and if he refuses on the ground that the declaration is merely voluntary and not a judicial proceeding, a bill may be filed against him, and then the declaration would become part of a judicial proceeding and the purchaser would be compelled to take the title, and probably pay the costs of the suit.

This we strongly advise, that when such a declaration is relied upon, the purchaser's solicitor should himself see the declarant and cross examine him as to the facts stated.

W. C. W.

ART. VI.—ECCLESIASTICAL LAW.

A Practical Arrangement of Ecclesiastical Law. By Francis Newman Rogers, Esq., Q. C. London. 1840.

LORD COKE says, "Some may doubt how we that professe the common law should write of Ecclesiastical Courts, which proceed not by the rules of the common lawes."¹ Mr. Rogers, in his preface, anticipates a similar doubt, and says that his undertaking would not have been prosecuted "if there had been even the slightest prospect that the subject would have been taken up by abler and more experienced hands."

In arranging and executing his work his plan seems to have been, to reject such articles of Dr. Burn's work as appeared to be of inferior practical importance, to write anew those heads which are of the most general interest, and to introduce some additional articles which are not given by Dr. Burn. Some of the most important heads in Dr. Burn's book,—such as "Advowson," "Marriage," "Prohibition," "Wills," and others,—were in truth of little value, from a want of selection and arrangement of the materials. It is a book, however, which will ever be a storehouse of canon law,—like Ayliffe, Gibson, or Godolphin; but from the important alterations which have taken place within the last few years, it has gradually become less valuable as a book of general reference.

Of all the authors above enumerated, Ayliffe is perhaps the least known by common lawyers, but his "Parergon" is the best compilation of canon law. It is arranged and condensed with extraordinary care and industry; and an excellent lawyer, the late Mr. Justice Taunton, used to say that whenever a question of canon law came before him, he always resorted to the Parergon and was never disappointed. Mr. Rogers has drawn largely from this source. But it is upon the judgments contained in the ecclesiastical reports of modern days that he has mainly built, using in most cases the very language employed by the judge. It is true that this has given to the book before us somewhat of an abruptness of style, and to a person reading on and not merely referring to particular parts, it has a disjointed and patchy character. Yet

¹ 4 Inst. 321.

upon the whole we are inclined to approve the course which he has adopted. In the case of Lord Stowell especially, Mr. Rogers might well deem it a contempt of no ordinary description to convey a principle or rule in any other than the inimitable language in which it had been laid down by that highly gifted judge. In the whole range of English literature there is hardly to be found any thing more graceful than the style of Lord Stowell's judgments. Though a captious critic may sometimes say what Horne Tooke said of Junius, "*materialiam superabat opus*," they will long remain the monuments of the extraordinary faculty he possessed of dignifying mean and elevating common-place topics; and, above all, of rendering the most dry and abstruse subjects of legal inquiry interesting to a general reader.

The judicial reputation of Sir John Nicholl rests on a different basis. *His* judgments are models of another class: when he investigates a principle of law, he traces it through all its deviations, follows it home to its commencement, and then exhibiting it free from alloy or doubt, obtains for it immediate recognition and acknowledgment. In dealing with facts he never allows himself to be embarrassed by technical or artificial rules: his conclusions are those of sound sense, enlarged and improved by the observation and experience of a man of the world; and though not so much as attempting to emulate the varied elegances of his judicial cotemporary, Lord Stowell, his language is always clear and correct, and, when the occasion requires, nervous and dignified.

For the modern practice in the titles of Evidence, Pleading, and Process, Mr. Rogers has taken the Special Report made in 1832 by "The Commissioners appointed to inquire into the Practice and Jurisdiction of the Ecclesiastical Courts" as a foundation upon which to work in a digest of the modern decisions,—illustrated and explained to a certain extent by references to Ayliffe, Clarke, Conset, and Oughton, as the authorities for the ancient practice.

Having thus described the general plan of this work, and indicated the sources from which the mass of its materials have been drawn, we will proceed to notice a few of the more important topics in detail; which will have the double advantage of putting our readers in possession of the present

state of legal opinion regarding them, and at the same time illustrating in the most effective manner the high merits of the book.

Bastard. Under the title "*Bastard*,"¹ the question of "*Access*" is discussed somewhat at length. Mr. Rogers seems inclined to combat the more modern doctrine on this subject, and contends that if personal access by a husband is once shown, that is, if husband and wife be once shown to have had an interview, the law raises a conclusive presumption of intercourse, unless the negative be proved or the impossibility of intercourse be established. After noticing the opinions of Lord Redesdale, in the Banbury Peerage case; of Lord Eldon, in *Head v. Head*, 1 Turn. & Russ. 141; and of Alderson, B., in *Cope v. Cope*, 1 Moo. & Rob. 275, he adds, "Besides, what is to prevent such a principle from extending to the case of a wife living under the protection of her husband, and from withdrawing the veil which the law has thrown over the habits of domestic life; if, in order to disprove paternity, a jury may be allowed to speculate on what takes place at a single interview, why may they not speculate on what takes place whilst the parties inhabit the same house, a sufficient ground being first laid by proving a total estrangement from nuptial intercourse, and loose and profligate conduct on the part of the wife; if actual paternity be the real object of inquiry, cases have arisen in which it might be as satisfactorily disproved where man and wife are living under the same roof as where they are living apart. But the question in all these cases seems to be, not whether A. is the actual son of B. according to the order and course of nature, but whether he is the legitimate son of B., the son according to law; that is, born under such circumstances as the law appoints to constitute legitimacy."²

Upon such a subject as this, considering the difficulties with which it is surrounded, and the sort of inquiries necessary for minute investigation, general principles are the best. The compiler of the *Repertoire de Jurisprudence*³ thus expresses himself, "*Si cependant la femme prouvait que son mari lui a rendu visite pendant la separation, nul doute qu'on ne dut declarer legitime l'enfant qu'elle mettrait au monde.*"

¹ P. 79.

² P. 80.

³ Tom 17, p. 415, tit. Legitimité.

Mr. Rogers then proceeds¹ to give a chronological abstract of all the cases on this subject, with the opinions of the judges in the Banbury Peerage case, noticing however in the outset a dictum, that the presumption of real issue was always open to discussion centuries before *Pindrell v. Pindrell* had exploded the doctrine of "*extra quatuor maria*." Assuming that this opinion applies to Foxcroft's case, 10 Ed. I.; Roll. Abrid. 359, and Radwell's case, 18 Ed. I., and Co. Litt. 123 b, Hargrave's note, 190,—he proceeds to show that those cases do not apply, and that *Pindrell v. Pindrell*, 2 Strange, 925, was in truth the first case which, by admitting evidence of actual paternity, did get rid of the confessedly absurd doctrine of the "*extra quatuor maria*." In passing, however, he exonerates Lord Coke from a charge brought against him by Lord Redesdale in his speech on the Banbury Peerage case,—that, when Lord Coke stated that if the husband were within the four seas the legitimacy of the son could not be disputed, he made the law and did not declare it. Mr. Rogers refers to several cases in the Year Books, showing that the law had been so declared and acted upon long before the time of Lord Coke.

In mentioning Foxcroft's case,² he notices the observations of Sir H. Nicolas, in his able book on *Adulterine Bastardy*, that the illegitimacy established in that case arose out of the insufficiency of the marriage, and that it could not have turned on the question of paternity, because the case itself states as a fact that the woman to whom Foxcroft was married was pregnant by himself. Mr. Rogers adds, what seems to have escaped observation before, that, whether Foxcroft was the father of the child or not, still, having married the woman when enceinte, he would be held, not only by our law, but by the canon and civil law, to have adopted the child with which she was pregnant.

Radwell's³ he contends to have been the case of a posthumous child, in which the heir is entitled to a writ to ascertain whether the widow is or is not pregnant at her husband's death, but is not entitled to an inquiry whether the child be the husband's or not; and he cites a case from the Year Book, 43 Ed. III., in which the heir tendered an issue that the widow

¹ P. 81.² P. 81, 82.³ P. 83.

was not with child by her husband. Thorpe, C. J., said, you cannot have such an issue to bastardize the child; and therefore issue was taken generally whether she was with child at her husband's death or not.

In speaking of the period of gestation, with the rule of the Scotch law and of the Code Napoleon, he notices the Gardner Peerage case, and makes the following observations:¹ "If a man in sound health were to die suddenly, and his widow not to be confined till even more than three hundred days after, as it seems by no means physically impossible that gestation may have been so long protracted or even longer; and if the conduct of the wife afforded no ground for suspicion, it would be hard to say that such a child was not legitimate until the uniform opinion of scientific men shall affix a period of possible gestation. The mere circumstance of a child being born some time after the usual time of gestation has expired, could not, standing alone, decide the question; but where there are circumstances in the case leading to a strong suspicion that the husband was not the father, the additional fact of gestation protracted beyond the ordinary period would be strongly confirmatory, and indeed almost conclusive of illegitimacy. It must be remembered that forty weeks is the rule; an extension beyond that period, the exception; and though where the woman is of general unimpeached character, and no circumstance appears in the case to excite suspicion, the legal presumption in favour of legitimacy will sustain the excepted case up to the bounds of physical impossibility; yet, where the general character of the woman destroys that legal presumption, or where her conduct in the particular case raises a contrary suspicion, then the improbability that the child could be the husband's, from the birth being out of the ordinary course of nature, so far from being counteracted and rebutted by the other facts in the case, is supported and confirmed by them."

Canon Law. Under this title² is given a short history of the origin of the canon law, of what it consists, and how far it is to be considered as binding upon the laity; and the author cites the opinions of Lord Hale, *Hist. Common Law*, 27; of Lord Hardwicke, in *Middleton v. Crofts*, 2 Atk.

¹ Page 100.

² P. 134—136.

650, Stra. 1056, 1060; and of Sir J. Nicholl, in *Norton v. Seton*, 3 Phill. 162, to show, that, unless it has been adopted and so become part of the common law, or been recognized by statute, it is not binding on the laity; though when canons have been confirmed by the king, the clergy are bound by them.

Mr. Rogers notices an observation by the court in the case of *The Bishop of St. David's v. Lucy*, 1 Salk. 134, that "though the canons of 1640 had been questioned, no doubt ever existed about those of 1603." With regard to these canons of 1640, it is said in Rushworth's Collection, vol. iii. 113, that on the 15th December, 1640, it was resolved by the House of Commons, nem. contr. that "they do contain in them matters contrary to the king's prerogative, to the fundamental laws and statutes of the realm, to the rights of parliament, to the property and liberty of the subjects, and matters tending to sedition and of dangerous consequence." The previous debate, though marked throughout by sound sense, is strangely disfigured by the dogmatical pedantry of the day. Take, for instance, Sir Edward Deering's speech, who opened the discussion:¹

"The pope, they say, has a triple crown, answerable thereunto; and to support it, he pretends to have a threefold law; the first is, *jus divinum*, episcopacy by divine right; and this he would have you think to be the coronet next his head, that which doth circle and secure his power. The second is *jus humanum*, Constantine's donation, the gift of indulgent princes, temporal power. These two crowns being obtained, he (the pope) doth make and frame this third crown himself, and sets that upmost on the top. This crown hath also his law, that is, *jus canonicum*, the canon law, of more use to his popeship than both the other."

Again: "They have charged their canons at us to the full, and never fearing that they would recoyle back into a parliament, they have rammed a prodigious ungodly oath into them."

In a note under title "*Church*,"² the author seems to combat the opinions of those who in the recent discussions on church rates, with reference to the ancient tripartite or quadripartite division of tithes, contend that a portion of tithes

¹ Page 100.

² Page 163.

ought still to be devoted to the repairs of churches. He contends, on the contrary, that the above division existed only at a period when the whole of the tithes and other pious contributions were paid to the bishop, who sent forth his clergy throughout his "parochia" or diocese to preach and distribute the sacraments to those districts which were too remote from the principal church of the parochia to enable the inhabitants to attend it; and that these, like our stipendiary curates, were paid by stipends for so doing. He denies that any such division ever existed after the country had been completely allotted into parishes and parochial endowments had been made; and he shows, by reference to the laws of Canute in Wilkins's Collection of Anglo Saxon Laws, that, when this period had arrived, the duty of repairing churches was treated of as a public burthen on the inhabitants, in the same general way as the duty of repairing the public roads.

We observe that in a note to the word "parochia," p. 613, Mr. Rogers complains of Ayliffe, for deriving that word from *παρεχω*, probeo, whereas Dufresne and others derive it from *παροικια*. Now though it may be true that our word "parish" is derived from the French *paroisse*, which doubtless comes from the Greek *παροικια*, yet the word *parochia* having reference only to the particular district within which certain sacred offices were performed, seems more correctly derivable from *παρεχω*.

Afterwards he gives a summary of the law of pews,¹ which may be useful in practice; and by an examination of the cases, shows that there is no authority for any supposed custom for the churchwardens to dispose of the seats in a church, independently of the authority of the bishop.

In a note at the commencement of the title "*Divorce*,"² he gives a sketch of the law as it existed under the provisions of the civil and canon law, and as it now prevails in different countries of Europe, as well as of the varying provisions of different states of the American Union on this subject. He considers our own system of granting absolute divorces by means of special acts of parliament (which adopts the principle of indissolubility of the canon law, but has transferred

¹ Page 171.

² Ib. 323.

from the pope to the legislature the extraordinary power of dissolving the vinculum) to have arisen out of the differences of opinion which existed on this subject at the Reformation, and the unsettled state of the law consequent upon such differences.

Marriage, as might be expected, is the subject of an elaborate article, distributed under ten heads: 1. The Contract; 2. Marriages by Banns; 3. By Licence; 4. The place and hour of Marriage in cases of Marriages by Banns or a Surrogate's Licence; 5. Marriages under 6 & 7 Will. IV. c. 85; 6. Dissent to Banns, forbidding Certificates and of Caveats to Licences; 7. Consent in cases of Minors; 8. Void and voidable Marriages; 9. The consequence of irregular Marriages; 10. Foreign Marriages. In speaking of the contract of marriage, the author questions the opinions of those distinguished persons who seem to have considered that marriage by the common law of England was only a civil contract. This inquiry, as he observes, has been most ably pursued by Mr. Jacob in a note to his edition of Roper's Law of Husband and Wife.

Mr. Rogers discusses the question on narrower grounds than Mr. Jacob. The argument of those who insist that the civil contract amounted to complete matrimony, is stated nearly in the words of Lord Stowell in *Dalrymple v. Dalrymple*, 2 Hag. Com. 64,—that though the canon law, which is the basis of our law of marriage, required solemnization, it so far respected the origin of marriage as to consider that, where the natural and civil contract was complete, it had the full essence of matrimony without the necessity of religious solemnization: that till the Council of Trent the intervention of a priest was not necessary even in the Church of Rome; and that in England, where the authority of that Council was never acknowledged, a church ritual was framed for the more solemn celebration of matrimony, a neglect of which exposed the parties to ecclesiastical censure, but did not render the marriage invalid.

By way of answer, Mr. Rogers takes up rather bold and apparently new ground, and affirms that the intervention and sanction of a priest were necessary to the validity of marriage

by the common law of this country, which has never recognized the distinctions of the canonists between regular and irregular marriages. After citing the words of Lord Hardwicke¹ "that if the clergy in convocation could have altered the common law the bishops need not have applied to the barons, and though the lords with one voice gave the memorable answer, '*Nolumus leges Angliæ mutare*,' the clergy might have done it in convocation by a new canon"—he adds, "there must however have been a law of marriage as well as of legitimacy before the introduction of the canon law, which the refinements of the canonists could neither unsettle nor fritter away."

In order to show what the common law was, he cites Stiernhook *de Jure Sueonum*, p. 159, and Wilkins's *Anglo-Saxon Laws*, 76, 78, from both of which it seems that though it was not necessary that the ceremony should take place in the church, great importance was attached to the presence of the priest; indeed, as the priest is introduced whenever the marriage ceremony is spoken of, it leads to the conclusion that his presence was a necessary part of it. He then gives a long bead-roll of cases at common law, showing clearly that, although the canonical restraints of Pope Innocent against clandestine marriages, which required that the ceremony should be performed "*in facie ecclesiæ*," prevailed for a period in this country to the extent of holding void a marriage not celebrated in a church, yet that before the Reformation this restriction was repudiated by the common law; and he justly observes that, as the canon law could not superinduce this restraint upon the common law, neither could it dispense with the presence of the priest. It is admitted that these cases do not expressly decide that the intervention of the priest was necessary to the validity of the ceremony, but his presence being carefully pointed at in all shows, like the authorities above-mentioned, that his presence formed a necessary ingredient to the validity of the contract. Indeed, in *Sir Robert Payne's case*, 1 *Siderfin's Reports*, 13, it having been urged in argument that Noy, the attorney-general, in his reading at Lincoln's Inn, had said, that when the spiritual court dissolved a marriage on the ground of pre-contract,

¹ 3 *Atkyns*, 658.

such first contract made the parties complete man and wife without further ceremony; Twisden, J., denied the position, and said that the marriage must be solemnized before they were complete man and wife.

He then cites the cases of *Hutcheson v. Brooksbank*, 3 Lev. 376, and *Haydon v. Gould*, 1 Salk. 119. In the first the man and woman, being both Dissenters, having married according to the forms of their particular sect, were libelled for fornication, and the libel was admitted and a prohibition was prayed and granted. Now if by the canon law, as recognized in this country, the civil contract was *ipsum matrimonium*, and marriage by that law were complete without the intervention of the priest, it is difficult to understand how the ecclesiastical court, which administers that law, could have admitted such a libel. The second was an appeal from the Prerogative Court to the Delegates, in which the distinction of the canonists between regular and irregular marriages was urged but overruled, and the decision of the Prerogative Court, which had rejected a plea of an irregular marriage, confirmed; and it is certainly important to notice that the Court of Delegates, composed of course of civilians and common lawyers, conclude their judgment by observing that the constant form of pleading marriage is, that it is "*per Presbyterum sacris ordinibus constitutum.*"

After alluding to the May Fair and Fleet marriages, a topic powerfully urged by Mr. Jacob, Mr. Rogers adverts to the authorities which have been cited on the other side, and attempts to show that Lord Stowell has hardly acted fairly in the mode in which he has dealt with them. He complains that the learned Lord has cited the case of *Jesson and Collins* from the *Modern Reports*, a book of inferior authority, in which what is given as part of Lord Holt's judgment appears, by the report in *Salkeld*, to have been an *obiter dictum* only; and that in citing *Wigmore's* case, which seems to have been reported by *Salkeld* only, p. 437, Lord Stowell says, "A contract *per verba de præsenti* is a marriage, and so is a contract *de futuro*; if the contract be executed and he take her, it is a marriage and they cannot punish for fornication." In *Salkeld* however, the report runs thus—"By the canon law a contract *per verba de præsenti* is a marriage, &c." The words in

italics, he adds, omitted by Lord Stowell, explain the meaning of Lord Holt in both the above cases, and the assertion "they cannot punish for fornication" seems to be at variance with *Hutcheson v. Brooksbank*, in which case the ecclesiastical court, twelve years before, had admitted a libel for fornication, and had refused to admit a plea of the marriage; and a prohibition was allowed only to have the law tried.

The note concludes with an inquiry whether, supposing the intervention of a priest to be requisite, it is necessary that he should be a priest in regular orders; and Mr. Rogers leans strongly to the conclusion that, since the Toleration Acts, this is not necessary, citing the language of Sir J. Nicholl in his celebrated judgment in *Kemp v. Wickes*, 3 Phill.

None of the Abridgments exhibit a satisfactory view of the Law of *Prohibition*. The Divisions in Viner are not logical, and are too minute. Comyn's Analysis is better, but the title is meagre. Upon the whole Bacon's, especially with the modern additions, is the best summary of the Law of Prohibition, but he does not embrace the whole subject. In his preface Mr. Rogers tells us that his article on Prohibition was originally intended as a treatise on that subject, but that it has been cut down in order to fit the dimensions of the present work.

The article bears marks of much care and labour. The subject is divided into three general heads: 1. Prohibition pro defectu Jurisdictionis; 2. Pro defectu Triationis; 3. For proceeding as the Law does not Warrant. The third head is subdivided into three: 1st. In handling temporal incidents; 2d. By refusal of a legal defence; 3d. By an erroneous construction of statutes.

After noticing the cases where, though the matter is generally of ecclesiastical cognizance, the particular court in which the suit is brought cannot entertain it, he proceeds to consider that class of cases where the Ecclesiastical Court has not jurisdiction over the subject-matter of the suit. Having collected and discussed them at some length, he proceeds thus: "The cases hitherto noticed have been those where the Ecclesiastical Court had no jurisdiction to entertain the suit, or had exceeded its jurisdiction, and in which, generally speaking, the defect would appear on the face of the libel; such cases

however, now that the bounds of the spiritual and temporal jurisdictions are well defined, are not of frequent occurrence; a more common class of cases is that where the Spiritual Court has full jurisdiction over the immediate matter of the suit, but where the temporal court is informed by suggestion or affidavit, or where it appears by the plea or answer or other proceedings in the Ecclesiastical Court, that the effect of the suit is to bring in issue some right or question not determinable in Court Christian, and which is consequently not within their jurisdiction to entertain.”¹

He then notices the manner in which this class of cases is described by Ayliffe in his *Parergon*, and proceeds: “In this class are not included those cases where a *modus*, prescription, or custom arises incidentally in the course of the suit. In those cases the particular issue being properly triable at common law, the trial is withdrawn from the Spiritual Court, but the suit itself is not determined, the ground of prohibition not being *pro defectu jurisdictionis*, but *pro defectu triationis*; it is not that the Spiritual Court has not jurisdiction to entertain and decide the main and ultimate issue of the cause, but that it is incompetent to try the particular issue incidentally raised. The prohibition *pro defectu jurisdictionis* extends to the whole cause, and its object is to put an end to it altogether; prohibition *pro defectu triationis* only extends to a particular issue, and its object is rather to facilitate the proceedings, by sending the trial of that issue to a court better adapted for the inquiry, and somewhat resembles the power formerly exercised by the temporal courts to send to the spiritual courts, for them to return their certificate. Prohibitions *pro defectu triationis* have been called prohibitions granted for the sake of trial, and are distinguishable from those which are granted to prevent trial.”

With regard to the practice in Prohibition since the statute 1 Will. IV. c. 21, Mr. Rogers makes the following observations, which we believe to be correct:

“Before this statute the declaration in prohibition was founded on a supposition or fiction, which was not traversable, that the writ of prohibition had already issued, and that the

party had proceeded in the court below notwithstanding such writ, and the action was in form *qui tam*, the crown being made a party to the proceedings; that form is, however, now no longer necessary, and the declaration must be framed in the mode suggested by the statute; so also, inasmuch as the declaration was founded on a supposition that the writ of prohibition had actually issued, if the issue either of law upon demurrer or of fact upon trial were found against the plaintiff in prohibition, it was necessary that there should be a formal judgment of ‘*quod est consultatio*,’ in order that upon the face of the proceedings the cause should appear to be restored to its original jurisdiction; but now, by the above act, as the declaration is not founded upon a supposition that a writ of prohibition has issued, but on the contrary prays that a writ of prohibition may issue, no such judgment, it seems, is required to be given; but the judgment, if in favour of the plaintiff, would simply be according to the prayer of the declaration, that a writ of prohibition do issue, or if in favour of the defendant, that it do not issue.”¹

Under the head “*Vestry*,” Mr. Rogers goes fully into the mode in which the different descriptions of parochial vestries are constituted.

Under the head “*Wills*” there is a pretty full digest of the decisions of the Ecclesiastical Courts, which are distributed under the different heads analytically given at the head of the article. The following is the substance of Mr. Rogers’ analysis: Of the Capacity of the Person making the Will;—Of the Instrument itself, considered with reference to its external form, and also as to its internal form and character;—Of Revocation;—Republication;—Of Executors and Probate;—Of Administrators and Letters of Administration;—Of the Inventory, and of Testamentary Suits. It will be seen from the above that under this head he only treats of such questions as arise in the Ecclesiastical Court.

The article “*Church Rate*” is given at the end, having been postponed in order to obtain the decision of the courts in the case of *Veley and Joslin v. Bunden*, better known by the name of the *Braintree Case*, in which the Court of Queen’s

¹ Page, 753.

Bench decided that a rate made by churchwardens after a refusal by the parish to make one was not a good rate, although it was not denied that money was wanting for the necessary repairs of the church—from which decision there is an appeal to the Exchequer Chamber.

The article is short, for there are very few decisions to be found in the books on the subject of church rates; hardly any indeed except such as have lately arisen upon the general or local church building acts. It concludes with a long note on the subject of retrospective church rates, directed against the doctrine that church rates are necessarily bad if any retrospective purpose appears on the face of the rate; and it is contended that the decisions upon poor rates, which are made by the authority of statute, do not apply. He says,¹ “In the opinion of the learned judge of the Consistory Court all retrospectiveness is not illegal, but whether such an objection be well founded or not, must depend upon the nature and amount of the retrospective items, which depend upon the discretion of the judge; if so there seems to be no reason why such a rate should be held invalid if those purposes are declared upon the face of the rate in the first instance; if it be the law of that court that a rate prospective in point of form is not to be upheld if it be for purposes which are retrospective and illegal, so neither ought a rate to be quashed merely because it appears to be retrospective, if its retrospectiveness be not sufficient, either in the amount or nature of the retrospective purposes, to render it invalid; in other words, if a prospective form be not allowed to cover retrospective purposes which would not be sanctioned by the court, so neither should a retrospective form vitiate a rate if its purposes, though retrospective, would be sustained by the court; in short, it would seem that a rate ought to be valid according to its real, not according to its professed, objects.”

He concludes the note with the following general remarks on the subject of retrospective rates:²—“The real objection to retrospective rates, however, is that parishioners being a fluctuating body, it is unfair for persons coming into a parish to be burthened with the debts of their predecessors, but this,

¹ Page, 1004.

² Page, 1007.

which is a substantial objection, applies to all retrospective rates, whether retrospective in form or not. It is an objection also which presses far more strongly against poor rates than against church rates ; in the first place, the overseer can of his own authority make a rate when he chooses, and it is his duty to see that the burthen is fairly distributed and borne ; in the case of church rates, it is the parishioners themselves who make the rate, and persons coming into a parish must be bound by the majority in this as in other cases ; besides, in the case of church repairs the objection does not seem to apply, for it is those who come into the parish who have the benefit of the outlay of money, not those who have left it."

We should be glad to continue our quotations, but the allotted space is filled, and we must content ourselves with adding a warm general recommendation of the work.

ART. VII.—CHURCH OF SCOTLAND QUESTION.

OVERTURE AND INTERIM ACT ON CALLS.

"EDINBURGH, May 31, 1834. The General Assembly declare that it is a fundamental law of the Church that no pastor shall be intruded on any congregation contrary to the will of the people ; and in order that this principle may be carried into full effect, the General Assembly, with the consent of the majority of the presbyteries of this Church, do declare, enact and ordain that it shall be an instruction to presbyteries, that if at the moderation in a call to a vacant pastoral charge the major part of the male heads of families, members of the vacant congregation and in full communion with the Church, shall disapprove of the person in whose favour the call is proposed to be moderated in, such disapproval shall be deemed sufficient ground for the presbytery rejecting such person, and that he shall be rejected accordingly and due notice thereof forthwith given to all concerned : but that if the major part of the said heads of families shall not disapprove of such person to be their pastor, the presbytery shall proceed with the settlement according to the rules of the Church. And further declare that no person shall be held to be

entitled to disapprove as aforesaid, who shall refuse, if required, solemnly to declare in presence of the presbytery that he is actuated by no factious or malicious motive, but solely by a conscientious regard to the spiritual interests of himself or the congregation."

Such is the too celebrated ordinance by the General Assembly of the Church of Scotland, which has raised a tempest of religious and civil discord in that country unparalleled since the days of the Stuarts, dividing congregations against patrons, people against aristocracy, the civil against the ecclesiastical tribunals, the State against the Church, and lastly the Church against herself. With its consequences however, fearful as they may be, we have nothing properly to do here. Our object and our province, almost if not wholly, is to come to right conclusions on its legality, to which end it is mainly necessary to consider the correctness of the introductory declaration, that "it is a fundamental law of the Church that no pastor shall be intruded on any congregation contrary to the will of the people;" for if that be correct, the rest is little more than matter of form.

In the first place, then, we may observe, that for a declaration of law this proposition is somewhat deficient in clearness. What is meant here by the will of the people? Is it the will of the people at large,—of the nation in other words? If so the proposition is at once encumbered with much difficulty; for as the will of a nation finds its proper expression in its laws, and as its laws are administered by its government, and as its government deutes to civil courts the administration of its laws, and as the supreme civil court of Scotland has solemnly decided that this very proposition is contrary to law, we have here this same will of the people deciding that a pastor *may be* intruded contrary to it. Both on account of this absurdity, and from the nature of the rest of the enactment, it is therefore fair to conclude that the Assembly in this part of their declaration have used a term too large, and that what they mean by people is only a portion of the people at large, as a congregation, a presbytery, or a synod; and looking further into the context, from what is said of the "heads of families" we collect that the proposition which the Assembly intended to advance is this:—"It is a fundamental law of the Church that no pastor

shall be intruded on any congregation contrary to the will of the majority of the male heads of families belonging to it."

A great deal has been written and argued about the injustice and illegality of the Assembly selecting this mode, admitted to be a new one, of expressing the will of the congregation by the mouths of the male heads of families alone. It has been urged, both in ecclesiastical and civil courts, that *female* heads of families have as much judgment, and as much a right to judge, about the fitness of their spiritual teachers as male heads; and that the adult population of the parish not male heads, as they have likewise souls, should have likewise votes in such a matter, their salvation being equally important. Without altogether making light of these complaints, we think it better to have the question argued on the great principle it involves only; and that if the General Assembly are able to prove it a law of the Scotch Church, that no pastor shall be intruded on any congregation contrary to that congregation's will, it is of very inferior moment to inquire whether they have chosen the most fair or legal form for expressing that will. Having thus relieved the question from some incumbrances, we propose to examine, in the first place, whether it is a law of the Scotch Church, that no pastor shall be intruded on a congregation contrary to the will of that congregation, or, in other words (for the Assembly are surely right in contending that the two propositions are identical), whether the simple declaration of the majority of a congregation, "we will not have this man to be our pastor," operates legally as an exclusion of him from that office.

This may be a law in either of two ways. It may have been law before the passing of the "Act" on the 31st May, 1834, or it may have become law from that date by the General Assembly declaring it to be so, and having power to make it law by declaring it to be so. Both positions have been advanced by the vindicators of the Assembly and both require serious consideration. Taking them in their order then, it must first be examined whether this law existed prior to the passing of the Interim Act.

If it did so exist, the proof of its existence would be found either in statute or in usage. Either the legislature would have declared it law, or would have recognized it as law by sanc-

tioning the practice under it. Both modes of proof have been resorted to by the advocates of the ordinance, and as that by statute would be more sure and decisive of the controversy it has been attempted with proportionate industry. In order to see with what success, it will be necessary to pass in review the Acts relating to the Church of Scotland, happily not very long or numerous.

In 1560, the first year in which a meeting called a General Assembly was held, popery ceased to be the established religion of Scotland and underwent total extinction by act of parliament in 1567. In the same year two statutes passed, one, c. 6, establishing the then prevailing form of Protestantism, which, though widely different from the Presbyterianism of later times, might perhaps be called Presbyterian, as the national religion; and the other, c. 7, entitled, "Admission of Ministers: Of Laic Patronages," and enacting that "the examination and admission of ministers within this realm be only in the power of the Kirk now openly and publicly professed within the same. The presentation of laic patronages always reserved to the just and ancient patrons. And that the patron present one qualified person within six months to the superintendence of the parts where the benefices, or others having commission of the Kirk to that effect:" otherwise the Kirk to have the turn, *jure devoluto* as it is called. We have here then the first statutory declaration of the rights of lay patrons and of the Church in relation to one another under the new establishment. The patrons were to present within six months, the Church exclusively were to examine and admit. The patrons' presentees were to be qualified persons, and the superintendents or others having commission were to judge of their qualifications; at least such is the fair inference from the words "present to." The superintendents seem to have been a sort of bishops covertly introduced into the system of church government by the queen and the court party, to whom the government by elders was unpalatable; and when in 1572 the convention of estates restored bishops, these superintendents were supported by the General Assembly as the preferable intruders of the two. They were sometimes laymen. Another clause of the same statute, c. 7, provided that if the superintendent or commissioner refused to receive and admit the presentee, there should

be an appeal for the patron to the superintendents and ministers of the province, and from them to the General Assembly. What the exact nature or constitution of the General Assembly at that time was, it is now impossible to ascertain. Thus we have the patrons, superintendents, commissioners and assembly, all authorized to perform respective functions in respect of the presentation of a minister, but no word of any voice of the people in the matter as yet. This important statute was ratified by act 1578, c. 61, and again by act 1581, c. 99.

In 1581, presbyteries such as now exist were first recognized by statute, c. 102. The advocates of the Assembly contend that, although this was the first statutable establishment of presbytery, it existed from the Reformation itself as eldership, not in the form of presbyteries indeed, but in that of synods and assemblies. It is not very material to ascertain how this really was. In 1584, three acts, c. 129, 131, 132, abolished presbytery entirely and enthroned episcopacy on its ruins, with the full approbation of the young king; but his feelings against presbytery became much moderated soon after his marriage.

In 1592 passed the celebrated act, c. 116, which was framed after a formal conference between the Church's and the King's commissioners, and has always been styled the "Charter of the Church of Scotland." It is entitled, "Ratification of the Liberty of the true Kirk : of General and Synodal Assemblies : of Presbyteries : of Discipline. All laws of Idolatry are abrogated : of Presentation to Benefices."

By this act, general assemblies, synods and presbyteries were ratified and approved, all their powers created or defined, so that a system of church government took date in Scotland from that time, little if at all different from that now in existence. But the material part of the statute for our consideration is that relating to presentations. It ordains "all presentations to benefices to be direct to the particular presbyteries in all time coming with full power to give collation thereupon, and to put order to all matters and causes ecclesiastical within their bounds, according to the discipline of the Kirk. Providing the foresaid presbyteries be bound and ascribed to receive and admit whatsoever qualified minister

presented by his majesty or laic patrons." We have here then the duty and the power which the act of 1567 cast on superintendents and commissioners, and an act of 1584 partially bestowed on bishops, transferred to Presbyteries as now constituted; the duty and the power, namely, of receiving, admitting, and collating qualified ministers to benefices when presented to them by the patron. A strong condition is superadded, that, be the minister who he may, provided he is a qualified minister, they must receive and admit him. The parties to the proceeding are here the patron, the minister, and the Presbytery, but the people have no part or lot in the matter. Not only are the people not entitled by this statute to intervene, but their intervention with any effect seems absolutely negatived by the denial of any option to the Presbytery as to the admission of the patron's qualified presentee.

The charter of the Scottish Church was soon invaded. In 1606, Episcopacy was re-established, and in 1612, Presbytery reabolished in Scotland, and the power of collating ministers transferred to the bishops again. But the institutions so odious to the people soon declined with the decline of the oppressors who supported them, and in the natural violence of reaction we find for the first time the people establishing a claim to have their voices also heard in the choice of their spiritual teachers, so that the year after the execution of Charles I. it was thought meet to recognize this claim in the decree of the Assembly of Divines respecting the "Uniformity of Church Government in both Kingdoms and the Doctrine of Ordination." It was therein provided that "he who is ordained minister is to be examined and approved of by those by whom he is ordained. No man is to be ordained a minister for a particular congregation, if they of that congregation show just cause of exception against him. A competent number are to appear before the Presbytery to give their consent or approbation to such a man to be their minister or otherwise to put in, with all Christian discretion and meekness, what exceptions they have against him, and if there be no just exception, but the people give their consent, then the Presbytery shall proceed to ordination." Under this it should seem that the Presbytery retained their former powers of admitting, and judging before they admitted, of the qualifica-

tions of presentees, but that a new element was introduced into the system ; the voice of the people having power to prevent the admission if they could show just cause for excepting, and the Presbytery having further to judge whether or not such cause was just. But the mere will of the people, the simple " We will not have this man," had not as yet any efficacy of rejection by statute.

In 1649 patronage was wholly abolished, and it was directed that ministers should thenceforth be admitted " on the suit and calling of the congregation." The statute directing this further recommended to the General Assembly to determine the just and proper interest of Congregations and Presbyteries in providing of Kirks with ministers, so that the provisions of the Assembly's Directory, made under and by virtue of this recommendation, may be taken as statute law themselves, so long as the act of 1649 remained unrepealed. These substituted a sort of presentation by the session of the congregation, that is, by the elders, for that of the patron, and gave to the congregation at large a power of dissent ; and if they assented, the Presbytery were to proceed to admit the candidate, having found him qualified as formerly. But the congregation had also a power of dissent. If the majority of them dissented, unless the Presbytery who were to judge the matter found their dissents to be grounded on causeless prejudices, a new election was to take place. If only the minority dissented, unless their exceptions were relevant and verified to the Presbytery, the latter were to proceed without regarding them. Much controversy has taken place about the meaning of these two provisions, which appear at first sight to put the majority and minority of a congregation on the same footing as to the effect of their objections, since both might make such as were not without just cause. To us it seems most probable that there was a difference and to this extent. If the majority objected, the Presbytery if they pleased when the matter came before them might give their judgment in favour of the objection without inquiry whether it was true, or question whether it was important, and, in order to prevent the objection prevailing, must give their judgment that it was grounded on causeless prejudice, and so could only defeat it by an active interference. But if only the minority

objected, the Presbytery could defeat the objection without active interference, as they might treat it as a nullity, unless important in itself, and proved by those who made it to be true. However this may be, the presentation of ministers remained thus regulated until the Restoration. The session of the congregation had the power to present, the congregation itself to reject, unless in cases where the Presbytery thought fit to say they had objected from causeless prejudice; and the Presbytery, as before, inquired into the qualification, and were bound to admit those whom they found qualified. But whether the Presbytery, in case a congregation had objected merely by saying, we will not have this man, without more reasons, would have found that a causeless prejudice; or whether any congregation would have so proceeded in those days, there seem now no means of ascertaining. There is no evidence that any did so.

With the Restoration came again the times of trouble and oppression to Presbytery. The repeal of the act of 1649, abolishing patronage, was perhaps no more than justice. But the re-establishment of Episcopacy in 1662 was a hard burthen to a people now thoroughly and unalterably impressed in favour of a different form of church government. During the dark and bloody years which followed, no claim of the people to a voice in the selection of ministers was even thought of. It was only by special indulgence that any form at all of Presbyterian worship was tolerated. All notions of religious liberty were denounced as traitorous,—all advocates of it persecuted and punished.

One of the first acts of the government of William after the Revolution was to abolish prelacy in Scotland, 1689, c. 3, and to reinstate the long suffering Presbyterian Church, on the same footing as it stood at the beginning of the century under the act of 1592. The act 1690, c. 5, expressly establishes, ratifies, and confirms the great Church Charter in all that concerns Presbyterian Church-government and discipline, with one reservation however, "except that part of it relating to patronages, which is hereafter to be taken into consideration." Accordingly in the same year was passed the act 1690, c. 23, intituled, "An Act concerning Patronages," which, after citing "that the power of presenting ministers to vacant

churches of late exercised by patrons had been greatly abused and was inconvenient to be continued within the realm," abolished patronages entirely, and directed for the future, "That in case of the vacancy of any particular church, and for supplying the same with a minister, the heritors of the said parish, being Protestants, and the elders, are to name and propose the person to the whole congregation to be either approved or disapproved by them; and if they disapprove, that the disapprovers give in their reasons, to the effect that the affair may be cognosed upon by the Presbytery of the bounds, at whose judgment and by whose determination the calling and entry of a particular minister is to be ordered and concluded," and if this is not done within six months, the presbytery, as under the old law, are to have the turn of presentation, *jure devoluto*. This act, though really dealing with the rights of patrons with as little mercy as that of 1649, affects to give them compensation by directing the parishes each to pay to them six hundred marks in lieu of their lost right of presentation. In point of fact it is believed that not above six or seven ever received even this paltry sum during the twenty-one years of this act being in operation.

For those twenty-one years then the parties concerned in the filling up of the ministry of a vacant parish appear to have been, the heritors and elders, who were to propose or present,—the congregation, who were to approve or disapprove,—and the Presbytery, who were to order and conclude on the collation of the particular minister. It is observable that, the clause of the act of 1592 relating to patronages not being revived, the power given to Presbyteries by that clause to judge of the qualifications of ministers was not revived either. It may be doubted then whether those bodies possessed by statute the right to do so during this period, unless they could be taken to possess it under the old statute of 1567, giving the same power to the superintendents and commissioners, to whose duties and offices the Presbyteries were the legal successors. Be this as it might, another power was expressly given to them more fully perhaps than they ever before possessed it, that of judging whether the reasons of disapproving congregations were such as to justify their refusing to admit a minister proposed to them. So that here, as under the act

of 1592, the strongest negative evidence appears that the intervention of the people by a simple refusal to take the minister was not only not authorized, but made and treated as a mere nullity. The former act does not contemplate any objection by the people at all, the latter empowers them to object when they can show reasons for so doing, but both are equally opposed in spirit to the efficacy of a simple "We wont have him," a challenge without cause shown.

In 1711 passed the most important statute of all for our inquiry, as being still the law of the land, the 10 Ann. c. 12, intituled, "An Act to restore the Patrons to their ancient Rights of presenting Ministers to the Churches vacant in that part of Great Britain called Scotland." It recites the act of 1690, and the mode of presentation pursued under it, and thus proceeds:—"And whereas that way of calling ministers has proved inconvenient, and has not only occasioned great heats and divisions among those who by the aforesaid act were entitled and authorized to call ministers, but likewise hath been a great hardship upon the patrons, be it therefore enacted, that the aforesaid act, in so far as the same relates to the presentation of ministers by heritors and others therein mentioned, be and is hereby repealed and made void; and that in all time coming, the right of all and every patron or patrons to the presentation of ministers to churches and benefices, and the disposing of the vacant stipends for pious uses within the parish, be restored, settled, and confirmed to them; the aforesaid acts or any other act, statute or custom to the contrary in any wise notwithstanding; and that from and after the 1st day of May, 1712, it shall and may be lawful for her majesty, her heirs and successors, and for every other person or persons having right to any patronage or patronages of any church or churches whatsoever in that part of Great Britain called Scotland—to present a qualified minister or ministers to any church or churches, whereof they are patrons, which happen to be vacant; and the Presbytery of the respective bounds shall and is hereby obliged to receive and admit in the same manner such qualified person or persons, minister or ministers as shall be presented by the respective patrons as the persons or ministers presented before the making of this act ought to have been admitted."

Nothing could be plainer than the purport and effect of this enactment, but for the condition with which the concluding words were clogged. It repeals the act of 1690 concerning patronage, and by doing so restores the law respecting it to the state in which it stood before. The old charter of the Church of 1592, had been revived in all its parts, except that relating to patronage at the time of the Revolution by act 1690, c. 5. This act of Anne revives that part also, and re-enacts in words as strong and very similar to those of 1592, whereby Presbyteries were bound and astricted to receive and admit qualified presentees, that the Presbyteries are obliged to receive and admit qualified presentees. But what is the meaning of "in the same manner as the persons and ministers presented before the making of this act ought to have been admitted?" The advocates of the General Assembly say that it means this—in the same manner as during the twenty-one years between the passing of the act of 1690 and that of 1711; that it means this,—the Presbytery is obliged to receive and admit a minister who has been presented to the congregation for their approval or disapproval, provided they do not disapprove; and thus they prove that the part of the statute of 1690 requiring the minister to be presented to the congregation, and the congregation to approve or disapprove him, is not repealed but continued. The advocates of patronage say the meaning is,—that the Presbytery is to receive and admit the presentee of the patron, as Presbyteries of old used to receive and admit presentees, when patrons had the power of presentation. The advocates of the Assembly taunt their opponents with the absurdity of construing the words "before the making of this act," to mean not time immediately preceding, or time past generally, but only those few remote scattered periods of time when patrons had the power to present, and Presbyteries to admit, simultaneously. The advocates of patronage taunt their opponents with the absurdity of making the clause expressly repeal the act of 1690 as regards presentations, in the first sentence, and impliedly revive a most material portion of it in the last. The fact is, the church interpretation is wholly inconsistent with common sense, and the lay interpretation contrary to the most obvious meaning of the words. Yet as the words *may* bear

another meaning, we think it better and more respectful to conclude that the legislature of Queen Anne's time were deficient in correctness of expression, than in ordinary understanding, and that when they passed this act they did intend to make the relations between Patron and Presbytery such as they had been before, when the one presented to the other.

But grant that the advocates of the Assembly have the best of this logomachy, what follows? Even if they establish that the law still requires the presentee to be offered to the people for their disapproval or approval, they are not one whit nearer to the point they aim at, the right of the people wilfully and without reason to reject. The conditions of the act of 1690 must still continue; the Presbytery must still judge whether the reasons for disapproving ought to prevail. We have therefore perhaps done wrong in dwelling on this issue so long, though in one point of view at least it is not unimportant. The zeal and pains with which a thing so insignificant to the argument has been contested, show very satisfactorily how little there is in all the statute book, respecting the Scottish Church, on which the champions of her present demand feel they can rely.

We must not conclude our review of the statutes without noticing that the 5th section of the statute of Anne declares that nothing in that act shall extend, or be construed to extend, to repeal and make void the act of 1690 concerning patronages, excepting so far as relates to the calling and presenting of ministers, and to the disposing of the vacant stipends in prejudice of the patrons only. This section has also been brought forward as evidencing the intention of the legislature to continue the privilege of approval and disapproval to the congregation. But as there are other portions of the act of 1690 to which this exception more fairly applies, it seems to us that the case of the Assembly may be more strongly supported by the concluding words of the first section.

If then we were shortly to epitomise the history of patronage from the Reformation, in so far as the statute law throws light on it, neglecting those periods when episcopacy was the dominant religion, the following results would appear. During eleven years, from 1649 to 1660, the election or presentation

of ministers was by the elders of the congregation; during twenty-two years, from 1690 to 1712, by the heritors and elders; and during all the rest of the two hundred and seventy-four years before the framing of the "Act on Calls," by the patron. For the eleven years, the election was to be intimated to the people for their acquiescence and consent; and if the major part of the congregation dissented, the Presbytery was to judge if the same were for causeless prejudices or not. For the twenty-two years, the person named was to be proposed to the whole congregation to be approven or disapproven; and if they disapproved, they were to give in their reasons, to be cognosced by the Presbytery. For the rest of the time the congregation had no authority to interfere at all. But during the whole period, from 1560 to 1834, there is not the shadow of a shade of a pretence for saying that any act or acts directed or recognized, or even permitted, an interference by the congregation to the extent of rejecting the minister proposed by a simple negative, without cause shown.

We had well nigh forgotten to notice the disingenuous fallacy by which the advocates of the Assembly have endeavoured to bolster up their desperate case upon the statutes. It has been said—the statutes one and all require the patron to present a *qualified* minister; the minister, whom the people refuse, is not a qualified minister, and therefore the patron has not performed his part of the proceeding, and the Presbytery are bound to reject the minister as unqualified. Acceptibility, so runs the argument, to the majority of the congregation, is a qualification,—unacceptability a disqualification. The Scotch, and Scotch divines especially, are known to be good logicians. It needs therefore a large measure of charity to believe this argument sincere. A quality, in vernacular as well as in philosophical speech, denotes that which a man is, not that which he is thought of by others. It is a thing personal of the metaphysical person, as exactly and simply as a nose is of the physical person. Imagine the estimation in which a sage would be held, who should maintain that the public admiration for the Duke of Wellington was a quality of that celebrated man, or that the yell of execration with which the mob received Courvoisier on the morning of his execution was a quality of that worst of murderers. Look

too at the statutes themselves. The word "qualified" occurs eight times in them ; thrice in the act of 1567, twice in those of 1592, twice in that of 1711, and once in 5th Geo. I. c. 29. In each and all it distinctly appears that "qualified" refers to the nature and character of the individual, apart from any considerations of the esteem a particular congregation may hold him in. Look too at the course of proceeding to be followed in cases of presentation. The patron has the initiative. He is to present a qualified person, before the congregation come to express any opinion in any manner whatever. And yet if they say "We do not like him," he is not qualified. The patron then when he presents cannot know whether his presentee is qualified or not. He is thus commanded by statute to perform an impossibility, and the statute itself becomes absurd. Again, the office of the Presbytery is to try, and, if it finds him qualified, to admit the presentee. How can one try what another has prejudged, how entertain the question whether a minister is qualified, already unqualified by a forum from which there is no appeal? Lastly, out of their own mouths are these sophists condemned ; for the second Book of Discipline, which they honour as a chief corner stone of the Scotch Church, and which they use very forcibly, as we shall see, in another part of this argument, clearly distinguishes the two requisites for a minister, of being agreeable to the will of the congregation, and being found to be qualified on trial ; and the Directory of 1649, already quoted, as having the validity of statute, expressly requires, first, consent of the people, and, secondly, qualification in the minister.

When driven from the position which they had taken up on the statute book, the advocates of the Assembly insist that their ordinance of 1834, in saying that it was a law of the Church that no pastor should be intruded on any congregation contrary to that congregation's will, truly declared a law, which, though unwritten, existed theretofore ; and this they seek to prove by evidence, of books of authority, of declarations and acts of the Church herself, of usage, of reported cases, and lastly, and more particularly, of the practice of Calls. We shall consider these in their order, though very shortly, as it is plain, if we are right in our position that the statutes

negative by necessary implication any such power in the people, no evidence of this kind could set it up.

As to the evidence of works of authority, they principally rely upon the first and second Books of Discipline. These were framed immediately upon the Reformation, the one in 1560, by Winram, Spottiswode and Knox, the other in 1578, by Andrew Melville; so that they must certainly be received as expressing the opinions of the leaders, and perhaps of the great body of the Presbyterians of those days. Both assert the right of the people to intervene in the election of the minister; and the latter explicitly states that no persons should be intruded into any offices of the Church contrary to the will of the congregation. Both also go much further; for they claim also for the people or the eldership the right of electing the minister, in derogation of all claims of patronage. If an authority for the one, then they are as much an authority for the other. Let us see however how they were looked upon by the Assembly and the Government, nearly contemporaneous with them. The first Book of Discipline was put forth before the Presbyterian Church came, as a Church, into existence; it must therefore be taken to express, not what the Reformers already possessed, but what they wanted to possess; and as one main object at that time was to obtain from the government an establishment on the best terms possible, we find the General Assembly, five years only after that book, asserting the right of popular election, was drawn up, thus addressing the queen: "Our mind is not that her majesty or any other patron should be deprived of their just patronages; but we mean whensoever her majesty or any other person do present any person into a benefice, that the person presented should be tried and examined by the judgment of learned men of the Church, such as are the present superintendents; and as the presentation to the benefice appertains unto the patron, so the collation by law and reason belongs unto the Church"—a simple exposition of what the advocates of patronage maintain at the present hour. The General Assembly then of that day treated the first book as no authority, and the legislature, by passing the act of 1567, which accords with this address, treated it as no authority also.

The second Book of Discipline, forasmuch as it was framed

after the reformed Church had been in some degree established, would be entitled to more weight. It was, as we have seen, the composition of one who, of all the early Scotch reformers, had the highest notions of ecclesiastical power and independence; and of these notions its contents are redolent. But it was not even from the first acquiesced in as a true statement of the constitution of the Church; and a conference was held between civil and ecclesiastical commissioners, for the purpose of ascertaining how far the government could agree to it. Shortly following, if not the result of this conference, passed the Charter of 1592, remarkable as incorporating almost verbatim many passages of this book, whilst others are wholly passed over. It has been said that the latter, being contained in a work of such authority, must be taken to be as good law by the silence of the act respecting them, as the others by positive enactment, and that accordingly, the direction of c. 3, s. 5, was good law, that no one be intruded contrary to the will of the congregation. If so, the direction of the 4th section, that election is the choosing out of a person or persons most able to the office that vakes, by the judgment of the eldership and consent of the congregation, was also good law, a position not maintainable even by Dr. Chalmers himself. The fact is, that the second Book of Discipline was never law, nor deemed to be law before 1834. It was the assertion of claims by a Church already waxing powerful, which claims were partly admitted, partly rejected, by the state, as appears by the act of 1592.

Many writers of learning and piety, especially Sir Henry Moncrieff, have been quoted for the purpose of showing that their opinion was in favour of the right now contested for on behalf of congregations. But as other writers of learning and piety have expressed the direct contrary opinion, it would be wasting time to dwell on these. Even Sir Henry himself has spoken somewhat inconsistently on the subject in different portions of his works.

As to the evidence derived from the acts and declarations of the Assembly, the advocates rely principally on an article allowed by the General Assembly of 1638, "that no persons be intruded in any office of the Kirk contrary to the will of the congregation to which they are appointed." If this is to

be regarded as a making of a law by a body having lawful power to make it, it will require consideration in another place; but regarding it merely as a declaration, evidencing the state of the law beforetime, it is indispensable to consider at what time and under what circumstances it was put forth. It was a time of the fiercest hostility to the established Church and the established government. Episcopacy was the law of the land, and Charles the First was on the throne. In setting up Presbyterianism at all the Assembly were in rebellion against the law—a bad law certainly, and a justifiable rebellion,—but still a law. It is not likely that at such a time they would feel over scrupulous about promulgating a dogma in accordance with popular wishes, though untrue, any more than in 1654, in the full tide of insolent success, they felt scrupulous about giving to Gillespie and others, their leaders, a new and separate veto on the appointment of ministers properly presented to congregations and approved by them; an usurpation as monstrous as any ever perpetrated by prelate or pope. We do not find any similar acts or declarations of the Assembly in quieter times; but we do find them laying down useful practical rules as to the admission of ministers. Thus by a regulation of 1596, in which the rules of the sudden admission and light trials of presentees are complained of, more diligent inquiry and trial of them is enjoined on the Presbytery, not only in learning and ability, but in conscience, feeling and spiritual wisdom. But not a word is said about the existence of any other check upon bad presentations. And so in 1711, when congregations had certainly possessed for twenty years a very powerful check thereon, we find the Assembly putting some restrictions upon the manner in which the congregation was to express its disapproval by requiring sufficient objections to be delivered in writing, and that within a certain date—a strange piece of precaution, if congregations had then the right to object, without assigning any grounds at all.

The advocates of the Assembly are not able to make out any practice or usage, apart from the question of Calls, for congregations to reject ministers without reason assigned, prior to 1834. But as it is very improbable, even if such a right existed, that it would be often exercised, or that much

evidence of its exercise would remain, the contrary could not be reasonably expected, and no conclusion can be drawn. It may be gathered, however, from Pardovan's Collections, and Connell on Parishes, that no such practice existed prior to the statute of Anne, and it is hardly contended that it has since prevailed. In those works it is stated, that before 1712 the usage was for the heritors, and elders, and the magistrates, if a borough, to apply to the Presbytery for a moderator in their call, and then to meet on a certain day and vote in the election of a minister; then the minister was taken on trial by the Presbytery, who gave notice to all persons, especially to the congregation, to make objections on a certain day on which they met in the Church, and if no objections were brought forward, they named another day for ordination, and on that day ordained him.

The reported cases are very few, and unimportant as either for or against the legality of rejection at the people's will, although some become material under a head of the argument to be hereafter considered. Accordingly they are claimed on both sides as authorities in point. They are *Moncrieff v. Maxton*, 1735; *Mercer's case*, 1740; *Hay v. Presbytery of Dunse*, 1749; *Dick v. Carmichael*, 1752; *Lady Forbes v. M'Williams*, 1762; *Lord Dundas and another v. Presbytery of Shetland and Gray*, 1795; *Bailee v. Morison*, 1822. In none of these, except the case of *Mercer*, was the point of rejection without cause directly mooted; and although the General Assembly rejected him without cause shown, on account of difficulties attending his Call, the fact being, that he was very unpopular with the parish and the country, it does not appear that the majority of the congregation expressed any formal rejection of him, but only that the Assembly took upon themselves to reject him on the ground of his unpopularity. This case was never carried before the civil court, and could be only evidence of usage at the most.

But it is on the continual practice of Calls that the advocates of the Assembly mainly rely, apart from statute, for proving the legality of the ordinance, and as the subject is any thing but familiar to the English reader, it becomes necessary, though at some length, to present a view of the nature and history of these Calls, in order to which, the whole proceedings in settling a minister must be shortly described.

On a vacancy occurring in a benefice, the patron presents to it, and his presentation, together with the presentee's acceptance, the certificates of the parties having taken the proper oaths to government, and an extract of the presentee's licence, are laid before the Presbytery. The presentee is then by them appointed to preach in the vacant parish, and a day for moderating in a Call, is fixed, of which the congregation is informed. On that day a sermon is preached by the member of the Presbytery who is appointed to moderate, at the conclusion of which the congregation is invited to call. Upon the Call being made, the Presbytery resolve to concur with and sustain it. It is put into the hands of the presentee, and devolves on him the care of worship in the vacant parish. The Presbytery then appoints a day for trial of his qualifications. If he is then found qualified, a day is fixed for ordaining him, and for requiring any who know cause of objection against him to show it. On that day, if no objection is made, (and if made, it must be tried at once,) the Presbytery proceed to ordination, and admit the presentee.

The only two of this long list of forms which are material here, are the Presentation and the Call. The patron presenting speaks to this effect:—"I nominate and present A. B., requiring hereby the Reverend Moderator and Presbytery of C. to take trial of the qualification, literature, good life, and conversation of the said A. B., and, having found him fit and qualified, to receive him, and give him his act of ordination and admission." The congregation calling speak to this effect. "We, the undersigned heritors, elders, heads of families, and other inhabitants of the parish of D., being satisfied with the gifts, piety, and learning of you, A. B., preacher of the Gospel, do call and entreat you to take the spiritual oversight of us in this parish, promising you all respect and obedience in the Lord."

Now, say the advocates of the Assembly, this Call always existed in the Church, and without it no presentation of the patron availed anything; and this Call, to be legally efficacious, should be signed by a majority, although true it is, that through negligence and indifference, a practice of signing only by a minority has grown up, the rest standing apart and not interfering, affirmatively or negatively. Further, they say

the declaration of the Assembly, that no person be intruded contrary to the congregation's will, is only a declaration, in other words, of the necessity of this Call by the majority, which was and is the law. And certainly, although the subsequent direction of the ordinance, that the majority of male heads of families shall express their disapproval in order to defeat a presentation, seems a somewhat singular mode of administering the old law, that a majority shall concur in the approval, in order to sustain a presentation; yet if such be the old law, the manner of obeying it suggested by the Assembly may pass, as it is wholly immaterial to the patron, and all else, whether his right of presentation is limited by the required assent, or required dissent, of a majority in the parish. But was it ever the law that a majority must concur in calling the presentee, and if so, when? Let us see.

In the second Book of Discipline, c. 3, we find the nature of "vocation or calling," treated of with great care and distinctness. It is there stated to be of two kinds, one extraordinary, of God, the other ordinary, of man. The ordinary calling has two parts, election and ordination; election being the choosing out of a fit person for the office by the judgment of the eldership, and consent of the congregation; ordination, the sanctifying of the person appointed, after he has been well tried, and found qualified. It has been shown, that as far as regards election, the statement is far from being accurate; but if it were, the only conclusion to be drawn is this: that the vocation or calling here spoken of, was the whole and entire process by which the vacancy in the ministry of a parish was to be filled up, including the choice of the minister by the eldership, the approval of him by the congregation, the trial of him by the Presbytery, the admission of him, if found qualified, and the sanctifying of him by the ceremonies of ordination. Now the Call the advocates of the Assembly are contending about, is simply the invitation of the people as a congregation to one to be their pastor. The two Callings, or Calls, are wholly different things, as different as the election of grace and the election of a member of parliament, though both go by the same name. The second Book of Discipline then affords no proof at all that at that time it was

the law or the usage for the majority of a congregation to invite their pastor by a Call.

The earlier statutes, 1547 and 1592, contain no mention of a Call or Calling, of any kind, nor is there anything further in support of it until the act of 1649, directing ministers to be admitted upon the suit and calling of the congregation. But this was the necessary consequence of the abolition of patronage; as the patron could no longer present to a vacant parish, some one else must be found to do so, and the convention of estates thought the congregation the proper persons to begin, by an invitation or call, the filling up of the vacant office. The General Assembly, however, thought otherwise, and by their Directory, framed on this act of 1649, as already mentioned, transferred this power of calling from the congregation to the session of the congregation, aided by the Presbytery. And nothing more in favour of the Call now under discussion appears until the passing of the act concerning Patronages, in 1690, if indeed then; so that to this time there is no particle of evidence that any thing like a call, in the sense of an invitation by a majority of the congregation, ever prevailed.

In that act several remarkable expressions occur. It makes certain provisions "to the effect the calling and entering of ministers in all time coming may be regularly and orderly performed." It is then said "by the determination of the Presbytery, the calling and entry of a particular minister is to be ordered and concluded." If the heritors and elders do not apply within six months "to the Presbytery for the call and choice of a minister," the latter are to fill the vacancy. It would almost seem, from these expressions, that the legislature of that day understood by "Call," a somewhat to be performed by the Presbytery rather than by the people. In point of fact, however, there is little doubt that the proceeding of the heritors and elders under this act, in proposing a person to the congregation, came very soon to be considered, and to be named, a Call. And so matters rested until the passing of the 10th Anne, c. 12.

It is from that date that this controversy on Calls assumes a really debateable shape. Until then, the advocates of the people's Call are able to show no more than the existence of

- the word, but from thence they produce evidence of the existence of the thing. There seems to be no reason to doubt that for a considerable portion at least of the century and a quarter that has elapsed since 1712, a Call, in the sense of an
- invitation to the minister, not by the patron, or by the session, or by the heritors and elders, or by the Presbytery, but by members of the congregation, was in common use.

How then did such a practice grow up? It does not seem to have existed before 1712, it was not sanctioned by any statute then or afterwards, nor even by any Act of Assembly before 1782, when, its propriety being questioned by some, that body declared, "That the moderation of a Call in the settlement of ministers is agreeable to the immemorial and constitutional practice of this Church, and ought to be maintained." The advocates of patronage explain it thus, and we have sought in vain for any other explanation. The Act of Anne having expressly taken from the heritors and elders the right to call, invite, or present the minister, and the patrons, to whom the right was restored, being averse or afraid to exercise it on account of the extreme unpopularity of the new law, for a period of many years few or no presentations were made by them. The congregations among whom vacancies in the ministry occurred, found that there was no one willing and able to take the initiative in filling them up. If no one were to interfere within six months, the presentation would lapse to the Presbytery. The congregation therefore interfered, and did, as the heritors and elders had done before, under the act of 1690,—they invited or called a person to be their minister, and the Presbytery aided them by admitting him, if properly qualified. So, when the patrons proceeded subsequently to use their rights of presentation, the congregation still continued to practise the same call or invitation towards the patron's presentee; in like manner as the custom still continues of asking the people at coronations if they accept the heir to the throne for king, although monarchy has ceased for ages to be elective; or the form survives of the election of a bishop by the dean and chapter, although the real choice has long been vested in the sovereign.

But more important is the question, how was the Call conducted: was it the real expression of the approbation of a

majority, given or refused at pleasure? The advocates of the Assembly say it was, and in support of this position they point to the acts of General Assembly, in 1753 and 1759, against simony practised by ministers in the procuring of Calls, whence they infer that Calls were at that time regarded as indispensable, and refusable at the people's pleasure; and also to the numerous cases where the General Assembly has sat in judgment on the validity and sufficiency of Calls. But in answer to the first point, it has been urged, that in case of an unpopular presentee, and an indifferent patron, simony might be as much needed to obtain a formal as a substantial invitation, the signatures of two or three, as of the major part of the parishioners; and, in answer to the second point, it must be admitted that none of the cases quoted are cases of a direct contest between a patron presenting one minister, called by a few only, and the majority of a congregation calling another, but between the Presbytery and the congregation; the patron in some not presenting at all, in some standing wholly indifferent, in some consenting to present anew, in some being expressly solicited by the Assembly not to insist on his presentation; and further, it must be admitted that the Assembly often settled the presentee who had only a minority in favour of his Call.

On the other hand, the advocates of patronage unquestionably show that for fifty years at least Calls have been a mere form, executed by an insignificant minority. The history of parishes, the records of the Assembly itself, show this in the frequent supplications made to it to "adopt such measures as it might think proper for converting Calls from a dead form to a living reality,"—"from a matter of mere form and expression, to one of real and substantial efficacy." And besides its occasional decisions against the Call of the majority, there occurred a case, that of Arbroath in 1790, where, though censuring the Presbytery for setting a minister without any Call at all, the Assembly declined to annul the settlement, a strong proof surely that it at that time regarded Calling a form only, although a form most proper to be observed.

On such conflicting evidence, with the balance decidedly against the advocates of the Assembly, it is impossible to say that, from the nature and history of Calls, they have at all

made out the proposition, that before 1834 it was a fundamental law of the Church, that no pastor should be intruded on any congregation contrary to the will of the majority. We have already shown it not to be made out by any other description of usage, or by positive law. There was then no such law of the Scotch Church prior to 1834.

The question then arises, had the General Assembly, on the 31st of May, 1834, a power to make this law? On this, as less strenuously contended for by its advocates, we need not dwell at so much length, although the General Assembly seems to have doubted whether the ordinance might not be best defended as a new law, by transmitting it to the Presbyteries for their approbation, which the Barrier Act required in case of a new law only. The Assembly's syllogism is this: "I have a right to make laws in all spiritual matters. This is a law in a spiritual matter. Therefore I have a right to make this law." There is good exception to be taken both to major and minor here.

First, then, we would maintain that it is not true that the Assembly has a right to make laws in all spiritual matters. In its law-making capacity it is itself the creature of law, and has only such powers of law-making as have been expressly entrusted, or tacitly allowed, to it. A Church, as an establishment, at least a Protestant Church, has no authority except that committed to her by the State. The Church of Scotland was created by the State, and her powers and privileges as an establishment were all derived from the State. This was better expressed than we can express it by the Solicitor-General, in his argument before the Court of Session on behalf of the Assembly. "When I say that the Church of Scotland is dependent on the State, I speak of the Church of Scotland as a national establishment, possessed of privileges and immunities, endowed with property, having an orderly gradation of judicatories in Sessions, Presbyteries, Synods, and Assemblies, and invested with high judicial, and not judicial only, but legislative powers. The Church of Scotland in this last sense, as regards its privileges as an establishment, is dependent on the State,—it is the creature of the State,—it derives its being and existence from the State." For example, as an establishment, the Church of Scotland has received from the State by statute

a power to be exercised through its Presbyteries, of admitting and collating a presentee to the office of minister of a particular parish,—a power in a spiritual matter as we must think, but yet a power which it could not possess unless the State had given it. The State at the same time has taken care to recognize the authority of the Church in another spiritual matter, which she possesses independent of the State, not as an establishment of man, but simply as a Church of Christ, namely, that of granting or refusing the rite of ordination, as she judges the candidate to be worthy or unworthy of it. Again, for example, the Church of Scotland might issue an ordinance, through its General Assembly, to all ministers to adopt and read the Unitarian Creed, a spiritual matter surely, and yet the General Assembly could have no lawful power to do this, because a condition made by the State for the existence of the Scotch Church as an establishment, is the maintenance of another creed, by acts 1581, c. 99, and 1690, c. 5. Thus it seems that there are spiritual matters in which the Church has authority to make laws of her own inherent right, and spiritual matters in which she has authority to make laws from the State, and spiritual matters in which she has no authority to make laws at all. If so, the first position of this argument cannot stand."

But supposing that we are wrong in our view of this matter, —a little out of our province perhaps,—is the second position taken by the Assembly correct, that this is a law in a spiritual matter? The right of presentation in the patron is on all hands admitted to be a civil right; and the question of the lawfulness or unlawfulness of a particular presentation a civil question. How, then, is the rejection of the presentee by the people a spiritual question? The patron says, "Here is my presentee, receive him;"—that is a civil matter. The people reply, "We wont receive him;"—how is that matter ecclesiastical? Does the nature of their objection make it so?—that is not in question at all. Do their motives? they are, or at least may be, entirely unknown. The people by this law have a share in presentation, by being empowered to refuse consent to any particular minister, just as the sovereign of these realms has a share in legislation, by being empowered to refuse consent to any particular law. They share then in

a civil right. And what is the Presbytery's part in the affair? It says, I cannot proceed to make trial of the qualification of your presentee in learning, piety, and so forth, because the congregation disapproves him, and that is a fatal objection to his admission. What is there in this of a more spiritual nature, than if the Presbytery refused to proceed on the ground that the necessary certificates had not been furnished, or that the presentation was illegally framed, or that the pretended patron had not the lawful right to present; each of which would undoubtedly justify refusal, and each of which as undoubtedly would be a matter cognizable by civil courts? Where a presentee is on trial by the Presbytery, the question whether he is qualified as to learning, or piety, or orthodoxy, may be admitted to be a spiritual question; but it must not be confounded with the simple proceeding or refusing to proceed to the inquiry, what his qualifications are in those respects. As well might it be argued, because an English corporation, ecclesiastical or civil, having power of free election to an office, cannot be interfered with by the civil courts as to the person whom they are to elect, that they cannot be interfered with to the extent of compelling them to elect somebody or other. The Presbytery, as a Church Court, has received its authority from the State to judge of the qualifications of a presentee, on the condition that it shall judge. It may say, and be right in saying, that a person objected to by the congregation has not been so presented as to call for its judgment. But the question whether it is right or wrong is a civil question. The miserable subterfuge resorted to in this part of the argument, that the Presbytery in rejecting a presentee, because the congregation dissent, does in fact make trial of his qualifications, hardly deserves mention. It is a paltering in a double sense with the word "trial," similar to that we have already exposed in regard to the words "quality" and "call."

But it is said that this is a law made by the supreme Church Court, the Assembly, in a matter to be performed by an inferior Church Court, the Presbytery, and that it is therefore a law in a spiritual matter, not cognizable by civil courts. The absurdity of this position may be shown at once by example. If so, the Assembly might make a law that the Presbytery should reject every one who accepted a presentation at all,

because patronage was unscriptural, or that it should reject every one who was objected to by one member of the congregation, or every one who had not the recommendation of Dr. Chalmers. But will any one contend that in such case there could be no legal remedy except by interference of parliament?

Further, it is said, that be this a law in matters spiritual or not, the civil court is ousted of all jurisdiction over it by act of parliament. This argument is founded on two statutes, that of 1567, c. 7, already mentioned, giving to the patron, in case the superintendent or commissioner refused to admit his presentee, an appeal in the last instance "to the General Assembly of the whole realm, by whom the cause being decided, shall take end, as they decern and declare;" and that of 1592, c. 117, providing that "in case the Presbytery refuse to admit any qualified minister presented to them by the patron, it shall be lawful for the patron to retain the whole fruits of the benefice in his own hands." The former act, it is said, proves that there is no appeal whatever from a decision of the Assembly on the rejection of a presentee by a Presbytery; the latter on the principle of law, that *expressio unius est exclusio alterius*, proves that the patron has no other remedy than a sequestration of the stipend, and this is sustained in numerous cases. But to the first we answer, that the statute must be taken altogether, and that as its purpose was to give to patrons the right of presenting, and to superintendents the right of trying the qualifications of presentees, so the appeal clearly contemplated was that against a wrong decision on the subject of qualification; and further, that the argument proves too much, as if correct, the Assembly is also final judge of all questions respecting a patron's title to present, his mode of making presentation, his loss of his right by lapse of time, &c. whereas there is an uninterrupted stream of authorities proving these to be questions within the jurisdiction of the civil court. And to the second we answer, that there is in reality no such legal principle, as that where a statute gives a partial remedy for a wrong, a more general remedy at common law is thereby taken away, but the direct contrary is of daily experience, and that the cases (of which an enumeration is given in the former part of this article) go to this extent only. They show a great dis-

position on the part of the civil court to shirk the decision of the extent of its jurisdiction over Presbyteries in questions of disputed presentation ; but they by no means amount to a repudiation of any jurisdiction at all. They are in fact poor authority either way ; and are quoted and claimed in aid by the advocates of patronage quite as eagerly as by their adversaries.

We have now brought this argument to a close, and conceive that in the course of it we have amply proved that the declaration or enactment of the General Assembly in 1834, that "it is a fundamental law of the Church that no pastor shall be intruded on any congregation contrary to the will of the people," is totally illegal and untrue. And so it indisputably appeared to the supreme tribunal of this country, when the question was raised on appeal from the decision of the Court of Session ; the Lord Chancellor and Lord Brougham, who alone gave their reasons for the unanimous judgment of the peers, declaring that no question of importance had ever been submitted to them on which they entertained less doubt. As a problem of law then it did not perhaps deserve the careful discussion we have given to it, but on account of its vast civil and political importance, and still more on account of its being so generally misunderstood or neglected in England, we have endeavoured to put it as fairly and as clearly before the reader as our ability permitted. It has hitherto been discussed as an abstract question only ; but this notice would be very incomplete, if a short view of its consequences, and of the present position of the Church of Scotland, as the result of this ill-advised attempt at usurpation, were not also given.

Very soon after the passing of the act quoted in the beginning of this article, the General Assembly proceeded to draw up regulations for carrying it into effect. These appeared on the 2nd of June, 1834. They contained full and particular directions as to the time when and the manner in which the simple dissent of the majority of male heads of families was to be expressed. One rule, the seventeenth, we must quote entire.

"That cases of presentation by the Presbytery, *jure devoluto*, shall not fall under the operation of the regulations in this and the relative acts of Assembly, but shall be proceeded in according to

the general laws of the Church applicable to such cases. But every person who shall have been previously rejected, shall be considered as disqualified to be presented to the parish on the occasion of that vacancy."

The Presbytery then, it seems, was not to be subject to the same check as the patron, of having its presentation defeated by the will of the people ; but in such cases the general law of the Church was to be followed. The Assembly must have slumbered for a moment when this article was framed, for surely this is tantamount to an admission that by the general law of the Church the will of the people was inefficacious to defeat presentations. Or was the Assembly only too widely awake to the necessary effects of their new law and new regulations taken together, which could only be—that when a patron's presentee was rejected on account of the dissent of the congregation, the patron would stand upon his right and refuse to present another ; the six months would expire ; the Presbytery would claim the presentation *jure devoluto*, and exercise it without the people having any further negative !

The act and the regulations being published, a case speedily arose under them. On the 31st August, 1834, the church and parish of Auchterarder became vacant, and on the 14th October following, the presentation of the Reverend Robert Young by the Earl of Kinnoul, undisputed patron, was laid before the Presbytery of Auchterarder. The Presbytery then proceeded to take the usual steps thereupon, and on the 2nd December a Call to Mr. Young was produced, and signed by three persons. The Presbytery then proceeded to afford opportunity to the male heads of families to give in special objections or dissents for cause, but none such were given in ; and then, in obedience to the new act and regulations, to afford the same opportunity for simple dissents, when it appeared that a majority of the male heads dissented, on which ground the Presbytery ultimately rejected Mr. Young. He appealed to the Synod of Perth and Sterling, and from that to the General Assembly, but without success. The patron and his presentee had then recourse to the civil tribunals for redress, and the case of the Earl of Kinnoul and the Rev. R. Young against the Presbytery of Auchterarder was argued before the whole thirteen judges of the Court of Session on the 21st

November, 1837, and several following days, at great length. On the 27th February and six subsequent days these judges delivered their opinions *seriatim*, when it appeared that eight were in favour of the pursuers, five in favour of the defenders. The defenders appealed to the House of Lords, and on the 3d May, 1839, an unanimous and unhesitating judgment was there pronounced, sustaining that of the majority of the court below.

We have looked with very anxious care into the reasons of the five Scotch judges, Lords Fullerton, Moncrieff, Glenlee, Jeffrey, and Cockburn, for the opinion they came to in favour of the General Assembly, but we have been wholly unable to extract from them any thing worthy of the name of argument, or of their lordships' previous reputation, as to the general question of the legality or illegality of the ordinance. Indeed this point is little laboured by any of them, by some not at all. The ground on which they mainly found their singular decision is, that the Court of Session had no jurisdiction to judge the Presbytery's conduct in this matter; that a question of this description is *extra vires* of a civil court. This was especially contended by Lord Jeffrey, displaying the same ingenuity and brilliancy as a judge, which he has so often displayed as a reviewer, in bolstering up an infirm cause. But even his as well as the others' arguments on this head are very similar to those by which the House of Commons and its advocates lately sought, though happily without success, to establish the total exemption of *their* functionaries from the jurisdiction of courts of justice; about as candid, about as rational, and about as constitutional.

The principal conclusion arrived at by the judgment of the Court of Session was, that the Presbytery of Auchterarder had acted illegally in rejecting the presentee on the ground of a simple dissent by the male heads of families. Subsequently further proceedings to enforce this decision have been taken, but as the Presbytery of Auchterarder have remained faithful to their ecclesiastical superiors, and set the law at defiance accordingly, this case does not latterly present such alarming or interesting features as that of Strathbogie, recently so much under discussion.

The Presbytery of Strathbogie, in obedience to the act of

1834, having rejected Mr. Edwards, presentee to the parish of Marnoch, on account of the dissent of a majority of the congregational heads, the same proceeding as in the Auchterarder case was taken against them, and a similar judgment obtained. This was followed by an interdict or injunction prohibiting the Presbytery of Strathbogie from proceeding to induct or settle any other minister in the parish. And on the 13th June, 1839, Mr. Edwards obtained a further judgment of the court against them, declaring that they were bound and astricted to make trial of his qualifications as presentee, and if they found him qualified to receive and admit him as minister of Marnoch. The majority of the Presbytery having intimated their intention to obey this decree, the commission of the General Assembly on the 11th December suspended them from their offices, both as ministers, and members of Presbytery. They however proceeded to take Mr. Edwards on trial, and found him qualified, but they have not as yet settled him. On the 14th and 20th February last, and again on the 17th March, the Court of Session found the suspension illegal, and interdicted all parties from giving effect to it. The General Assembly when it met as usual in the Spring confirmed the sentence of its commission on the 26th May, and on the 28th, before proceeding further, chose a committee and appointed a conference between it and the rebellious Presbyters, the result of which being that neither party would consent to yield anything, the Assembly on the 1st June last suspended the recusants anew, and enjoined the commission to take further steps of ecclesiastical censure against them in the event of their continuing contumacious, and by another sentence gave power to certain individuals to co-operate with the minority of the Presbytery of Strathbogie in supplying the pastoral duties of their respective parishes. The unhappy majority are therefore in this melancholy position. There is a judgment of the Court of Session against them to receive and admit Mr. Edwards. There is a judgment of the Assembly against them for their partial obedience to the Court of Session. Both authorities threaten them with further penalties in case of disobedience. Meantime they are burthened with costs in the civil courts, suspended from all ecclesiastical functions by the spiritual, and their

ministries transferred to others. Practically, however, we believe they contrive to maintain themselves in their parishes, being supported by their several congregations. And in this stage is left at present this perilous controversy.

Thus we behold in the Scotch Church, not only a Church divided against the State, but a Church divided against herself, by the fatal consequences of the act of 1834. It is no wonder that such a spectacle has filled with alarm all rational friends of Scotland. Amongst others Lord Aberdeen has endeavoured to find a remedy for the evil in legislation, and we have before us a lengthened correspondence between Lord Aberdeen and Dr. Chalmers on the subject. At the first sight, to one unused to the refinements of ecclesiastical diplomacy, it might seem that the difference between what the one party was willing to offer, and the other party was willing to accept, was hardly such as it was worth while to keep a kingdom in confusion for. Lord Aberdeen was willing to give to the Presbytery a power, uncontrollable by civil courts, of judging in all cases of the fitness of a presentee for the office, provided only that where he was objected to, the grounds of objection should be stated, and that the Presbytery if they rejected him should specify for what reason he was rejected. Dr. Chalmers was willing to give up the law of 1834, and required only what he called a *liberum arbitrium* for the Presbytery, which, besides the power of rejection conceded by Lord Aberdeen, should include a further power of rejecting a presentee, not compulsorily, but when the Presbytery should think proper to do so, without specific objection being made to him. Thus Lord Aberdeen offered a great boon to the Church, by enabling Presbyteries to reject presentees not merely on the ground of deficient qualifications, but on any ground whatsoever they thought fit, and that without the risk of interference by a civil court; judging, rightly as we think, that the publicity required to be given to the cause of rejection would sufficiently protect presentees and patrons from ridiculous or unjust decisions: and Dr. Chalmers yielded not a little of the Assembly's claims when he consented that the Presbyteries should not be compellable to reject in all cases on account of the dissent of the majority, but might exercise their own discretion in such a case. His reason for adhering

so stoutly to the occasional rejection, when the people object by simple dissent only, is most curious as given in his own words:—"Such," says he, "is the profound adaptation of Christianity to the human conscience, that a dissent on the part of a simple and religious people may be well grounded, although they cannot embody it in language, or present it to the Presbytery in a tangible form." One might be tempted in one's ignorance to call this nonsense, had it come from the pen of a less celebrated man. However, upon this little matter, whether Presbyteries should not now and then exercise a power of rejection without cause shown, has the whole negotiation split. Lord Aberdeen has been denounced as "endeavouring to depose the Redeemer from his throne;" his bill has been repudiated by the Assembly with expressions of loathing and abhorrence: and he has been charged even by Dr. Chalmers himself with something not unlike bad faith, in the variation of his Bill from his previous propositions. On reading the correspondence, however, it will be found that he has been perfectly consistent throughout, and that the bad faith, if there has been any bad faith, is most assuredly not on his side.

One good at least may be expected from this publication,—we shall no longer be troubled with the melancholy sight of Whig members and Whig newspapers thinking to win the Church of Scotland to their party by equivocal demonstrations in favour of her resistance to the law. The *Morning Chronicle* and *Globe* will cease, it is to be hoped, to aid and abet the venerable dame in her illegal and unjust pretensions, with the hope of courting her aside into the primrose paths of Whiggery, when they read the sentiments of Dr. Chalmers. It is amusing to see in his letters how the learned divine stimulates the noble statesman to larger measures of concession, nay even to the repeal of the 10th of Anne itself, by hints at what may be expected for the Church even from what he calls the "Radicals and voluntaries." "I am quite aware," says he, "of the worthless policy of the Whigs, which is to outdo in popularity the measure of the Conservatives, whatever that may be. How I should rejoice if the Conservatives on the other hand would in their turn contrive, and so wrest the measure from their grasp, thereby gaining for their cause in all

time coming the affections of the Church and people of Scotland." And again, "I would really implore the attention of the Conservatives to the proposal, now that it is quite manifest the only aim of the Whigs in this question is to outjockey their political opponents and to advance themselves—whether it were not better to counteract this by a recurrence to the state of matters in 1690?—It would take from the pests and disturbers of the commonwealth who are now in power, that topic of agitation by which they expect to keep Scotland in a ferment, out of which something might cast up for themselves." If these things be done in the green tree what shall be done in the dry? If these are the opinions of the comparatively moderate leader of the Scotch Church, what must be the opinions of his more intemperate followers? what the chances of liberalizing such men by pretended or even real sympathy?

Indeed, although it be a very old maxim that people are violent in proportion as they are wrong, it was never perhaps so fully borne out as by the conduct of the Scotch Church in this controversy. It is not merely from brainless bigots that the flood of violence and folly rushes forth, but the wisest and the gentlest seem to have changed their natures on this occasion. We are not surprised, and scarcely shocked, when we find such a man as the Rev. Mr. Cunningham, the Habakkuk Mucklewrath of the Assembly, ranting forth that "The legislature has taken up this matter as if it belonged to them—as if it were Cæsar's matter and not God's; and they have commanded the Church to do and not to do—that they must do this, and they must not do that, as if the office-bearer of the Church were the most obscene and insignificant of civil functionaries," and that "if there had been no other objection to the bill" (Lord Aberdeen's), "it would have been their duty to remonstrate against the conduct of the state for presuming to tell them what they were to do." But it is both shocking and surprising to find a man like Chalmers hurried along in the same whirlpool—declaring, that "it is a condition in itself most painfully humiliating" for the Church to be subjected to the operation of a legislative enactment—calling on his followers to raise the cry of "The Lord Jesus Christ is the only king and head of the Church of Scotland"—and concluding that "either the Church must remain in its present position,"

(i. e. in the exercise of its illegal claims,) “or the daughters of the uncircumcised will rejoice, the daughters of the Philistine will triumph.” When those in authority with the Church entertain and avow such sentiments, it is not surprising that the healing and highly conciliatory measure of Lord Aberdeen should have met with so unfortunate a reception, greatly favourable, perhaps too favourable, as it was, to the promotion of ecclesiastical power; for, to borrow the irreverent but apposite comparison of the Examiner:—“The Church is at this moment like a drunken man in a ditch who kicks at every one who attempts to pick him up, and in his indiscriminate fury even deals a buffet at the friendly hand which offers more gin.”

S.

DIGEST OF CASES.

COMMON LAW.

[Comprising 9 Adolphus & Ellis, Part 3; 2 Perry & Davison, Part 4; 3 Perry & Davison, Part 1; 1 Scott's New Reports, Part 1: 6 Meeson & Welsby, Part 1; 8 Dowling, Parts 1 & 2; and 2 Moody's Crown Cases, Part 1—all cases included in former digests being omitted.]

ACCOUNT STATED.

The mere production by the plaintiff of an I O U signed by the defendant, but not addressed, is *prima facie* evidence that it was given by the defendant to the plaintiff, in support of an account stated. (1 Esp. 426.)—*Curtis v. Richards*, 1 Scott's N. C. 155.

ACTION ON THE CASE.

(*By reversioner.*) The erection on the defendant's house of eaves and a pipe, overhanging, and conducting water on land in the occupation of a tenant, is a permanent injury, which gives a right of action to the reversioner.—*Tucker v. Newman*, 3 P. & D. 14.

ADVERSE POSSESSION.

(*Limitation Act—Pleading.*) Trespass for breaking the plaintiff's close. The plea stated a seisin in fee by W. and his demise, in 1791, to J. Hedger and Griffith, for ninety years, that they entered and were possessed; and being so possessed, in 1812 Griffith died, whereupon J. H., the survivor, became sole possessed for the remainder of the term; and being so possessed, in 1812 bequeathed to W. Hedger; that J. H. died in 1820 so possessed, the probate of his will &c., whereby W. H. became possessed; that plaintiff under colour, &c. entered, and that the defendant entered as servant to W. H. Replication: that the defendant's entry was after the passing of 3 & 4 Will. 4, c. 27, and that the right to enter did not accrue to W. Hedger or the defendant, &c. any time within twenty years before the entry. Rejoinder: that the close was not, at the time of the passing of the act, possessed by the plaintiff or any other person adversely to W. H. Surrejoinder: that it was at that time possessed adversely, to wit, by W. S. The dates were laid under a videlicet. The issue was found for the plaintiff: Held, as the dates were under a videlicet, and not in their nature material, that the replication was not contradictory, on the ground that it admitted W. H.'s right of entry to have accrued since 1820, and denied it to have accrued within twenty years; and the rejoinder admitted W. H.'s right of entry did

not accrue within twenty years, and put the case on the question of adverse possession.

That as the rejoinder admitted the right of entry not to have accrued within twenty years, and the question of adverse possession at the passing of the 3 & 4 Will. 4, c. 27, had been found against the defendant, he was not entitled to the five additional years given by section 15, and was in the situation of a mere wrongdoer; that it was therefore not necessary for the plaintiff to plead specially title in himself, in answer to the title in the plea, because his mere possession, as stated in the declaration, and admitted by the plea, was sufficient to maintain trespass against the wrongdoer.

That the rejoinder was not contradictory to the declaration, as the plaintiff might have been in possession at the time of the trespass, though W. S. was in possession at the passing of the act.—*Holmes v. Newlands*, 3 P. & D. 128.

AFFIDAVIT.

1. (*Jurat.*) The place of swearing an affidavit may be stated in the jurat by reference to the place in the body of the affidavit.—*Grant v. Fry*, 8 D. P. C. 234.
2. (*Time for filing.*) Where an enlarged rule requires affidavits to be filed within a limited time, the Court will not allow them to be filed afterwards, unless the omission arose from inevitable accident. (4 D. P. C. 16.)—*Wright v. Lewis*, 8 D. P. C. 298.
3. So, where a matter has been referred to the master, and he, in his discretion, has refused to allow affidavits to be filed after a particular day, the Court will not interfere.—*Hall v. Anderton*, 8 D. P. C. 326.

AGREEMENT.

(*Second action for breach of same agreement.*) It was agreed between the plaintiff and defendant, partners, that the plaintiff should relinquish his share of the business to the defendant, the latter agreeing to give the plaintiff a promissory note for 730*l.* payable by instalments, and in case a certain mortgage on property of the plaintiff's should be called in before the note should be fully paid, to pay the whole amount that should remain due, or provide a fresh mortgage. The plaintiff (after the mortgagee had given notice to redeem the mortgage) sued the defendant on this agreement in the Exchequer, alleging as a breach the non-delivery of the note. This cause was terminated by a judge's order, directing a certain note and securities to be given. The plaintiff afterwards brought a second action on the agreement in the Common Pleas, alleging as a breach the damages resulting from the calling in of the mortgage. Held, that a plea setting up the recovery in the former action afforded no answer, it having been brought in respect of a different breach.—*Bristowe v. Fairclough*, 1 Scott's N. R. 161.

AMENDMENT.

1. A declaration on a wager stated that the plaintiff bet the defendant that a railroad would be completed by a certain day, *for the general conveyance of passengers*. The wager proved was simply that the railroad would be completed by that day. The judge at the trial amended by striking out of the record the words "for the general conveyance of passengers." Held, that the amendment was properly made, as the amended declaration increased the plaintiff's burthen, by rendering it necessary for him to prove that the road was completed for all its purposes; and that therefore, as far as the defendant was concerned, the amendment was not in any material particular.—*Evans v. Fryer*, 2 P. & D. 540.

2. The plaintiffs sued the *secretary* of a joint-stock company, incorporated by letters patent under the 7 Will. 4 & 1 Vict. c. 73, for the infringement of a patent by the company. After verdict for the plaintiffs, and a rule granted to arrest the judgment, the plaintiffs were not allowed to amend the declaration, by showing that the company was so incorporated, and that the defendant was their registered officer.—*Galloway v. Bleaden*, 1 Scott's N. R. 170.

ARBITRATION.

1. (*Award, when sufficiently certain—Excess of authority in respect to costs.*) All matters in difference on the record in a cause were referred to arbitration, the costs of the action and of the reference and the award to be in the discretion of the arbitrator. The arbitrator awarded that the action should cease, and no further proceedings be taken therein; that the defendant should pay to the plaintiff 50*l.* towards the costs of the cause and reference; that the plaintiff should pay his own and the defendant's costs of the cause and reference, the said costs to be taxed as between attorney and client; and that the plaintiff should pay the arbitrator 25*l.* for his fees, &c.: Held, that this award was not uncertain or inconsistent; but that the arbitrator had exceeded his authority in awarding costs as between attorney and client; and that the order as to costs was so connected with the rest of the award, that it could not be rejected as surplusage.—*Seccombe v. Babb*, 6 M. & W. 129; 8 D. P. C. 167.
2. (*Making enlargements part of rule of Court.*) Where an arbitrator, pursuant to a power reserved to him by a submission, enlarges the time for making his award, the enlargement is to be considered as part of the original submission, and must be made part of the rule of Court, in order to move to set aside the award. And where there are two parts of the deed of submission, but the enlargements were indorsed on one part only, the Court compelled the party in whose possession it was to make it a rule of Court. (5 East, 189.)—*Smith v. Blake*, 8 D. P. C. 130.
3. (*Time for setting aside award.*)—A motion to set aside an award, pursuant to the 9 & 10 Will. 3, c. 15, made two terms after the publication of the award, was held too late, although the opposite party had improperly occasioned a part of the delay, by preventing the submission from being made a rule of Court.—*Smith v. Blake*, 8 D. P. C. 133.
4. (*Amending rule for setting aside award.*) A rule to set aside an award, under 9 & 10 Will. 3, c. 15, cannot be amended by the production of an affidavit made on the last day of the term next after the award was published.—*Holloway v. Monk*, 8 D. P. C. 138.
5. (*Attachment for non-performance of award.*) After the lapse of four years from the making of the award, the Court refused an attachment for non-performance of it, without an affidavit explaining the delay.—*Storey v. Garry*, 8 D. P. C. 299.

ASSAULT.

1. (*Plea of, certificate under 9 Geo. 4, c. 31, s. 27.*) A plea, to an action of assault, that the defendant had been summoned before two justices for the same assault, who dismissed the complaint, and granted the defendant a certificate of such dismissal, under the 9 Geo. 4, c. 31, s. 27, is bad, unless it set forth the grounds of the certificate, so as to show that it was given under such circumstances as to make it a bar to the action.

The venue of the declaration was in Surrey, and the plea stated that the complaint was dismissed by justices of Surrey: Held, that it sufficiently appeared that the assault was committed in the same county, so as to give jurisdiction to such justices.—*Skuse v. Davis*, 2 P. & D. 550.

ASSUMPSIT.

(*When it lies against a stakeholder.*) The plaintiff agreed with G. to pay him 25*l.* if he performed certain work to the satisfaction of a referee, and that a check for 25*l.* should be deposited with the defendant, to be handed over to G., if the work succeeded; if not, to be returned to the plaintiff. The check was so deposited, and the defendant presented and obtained cash for it. The referee subsequently disapproved of the work, but no decision by him was communicated to the defendant: Held, that under these circumstances, the plaintiff could not sue the defendant for the amount of the check; and that the turning of it into money was not a breach of the defendant's duty as stakeholder, which entitled the plaintiff to recover it as money received to his use, it not appearing by the evidence that the parties had contemplated any distinction between a check and money.—*Wilkinson v. Godefroy*, 9 Ad. & E. 536.

ATTACHMENT.

(*Service necessary for.*) Upon a motion for an attachment, the affidavit stated that the deponent left a copy of the rule with the party at his dwelling house, and at the same time showed him the original rule: Held, a sufficient allegation of *personal service*.—*Short v. Smith*, 1 Scott's N. R. 153.

ATTORNEY.

1. (*Summary jurisdiction over.*) To subject an attorney to the summary jurisdiction of the Court, it must appear, either that he is an attorney of the Court, (having signed the roll) or that *he has acted as such*.

An attorney in the country, to whom a writ of summons and notice of declaration were transmitted for the purpose of serving them, afterwards became the attorney for the defendant in the cause: Held, that his employment for the plaintiff was not such as to constitute him *his* attorney, and render him summarily amenable in that character.—*Cole v. Grove*, 1 Scott's N. R. 30.

2. (*Admission—Non-payment of stamp duty, effect of.*) In an action upon a bill of exchange, the consideration for which was business done by one W., as the attorney and solicitor for the defendant, the acceptor, the latter pleaded that W. was admitted an attorney of the King's Bench, and a solicitor in chancery in 1810, but took out no certificate till 1813, when he first commenced practising; that he thence continued to practise, duly taking out his annual certificate, until 1820, when he ceased to practise, and remained uncertificated; that he was re-admitted in the King's Bench in 1823, and neglected for more than a year to obtain a certificate, and that at the time the work in question was done, he had not been re-admitted in any of the courts at law, except as aforesaid. The replication admitted the facts stated in the plea, relied upon the subsequent admission of W. in the Common Pleas, and in Chancery, in 1826. And the rejoinder, assuming that W. was de facto admitted in the Common Pleas, as alleged in the replication, sought to avoid such admission in point of law, by alleging it to have been "without payment of further duty in that behalf, according to the form of the statute in that behalf:" Held, that the admission of W. in this Court must be taken to have been an original admission, that there was

nothing upon the face of the record to show that such admission was void; and consequently that W. was not incapacitated from suing for fees earned by him whilst duly certificated under that admission. The non-payment of the stamp duty at the time of admission, though it may subject the party to penalties, does not render the admission void. (See *Wilton v. Charubers*, 7 Ad. & E. 524.)—*Middleton v. Chambers*, 1 Scott, N. R. 99.

3. (*Bill*.) The insertion in an attorney's bill of items not particularized according to the statute 2 Geo. 2, c. 23, s. 23, will not preclude him from recovering the residue of the bill, as to which the statute has been complied with. (Ry. & M. 280.)

The bill contained seven items charged in gross; two only of these were found to be for business done at law or in equity: Held, that the plaintiff was entitled to recover in respect of the other five. (7 C. & P. 397.)

An aggregate charge for "extra costs" in an attorney's bill, is not a sufficient compliance with the statute.—*Waller v. Lacy*, 1 Scott's N. R. 186.

4. (*Taxation of bill after action brought*.) After action brought upon an attorney's bill containing any taxable item, the Court will refer it to taxation, without requiring from the defendant an undertaking to pay the amount found on taxation to be due, or imposing any other terms upon him. (2 C. & J. 370; 2 B. & Adol. 413.)—*Williams v. Griffith*, 6 M. & W. 32.
5. (*Costs of taxation*.) An attorney must pay the costs of taxation if more than one-sixth is taxed off his bill, though his client has not paid the amount of the taxed costs.

The rule for referring it to the Master, in such case, to tax the costs of taxation against the attorney, is absolute in the first instance, and the form of the rule is that the attorney shall pay the costs when taxed to his client.—*Neale v. Postlethwaite*, 8 D. P. C. 100. The application may be made at chambers.—*Sykes v. MacIise*, 8 D. P. C. 145.

6. (*Re-admission*.) Where an attorney, in consequence of wrong information at the Master's office, did not attempt to lodge his affidavit for re-admission till the afternoon of the first day of term, the Court, on his applying promptly, allowed him to file it nunc pro tunc.—*Ex parte Norman*, 8 D. P. C. 136.
7. (*Entering certificate*.) An attorney who has obtained his certificate may carry on a suit between the 15th November and the first day of Hilary term in any year, without having entered his certificate: but if it be not entered before the latter day, he will be liable to the penalty of £50, imposed by the 37 G. 3, c. 90, s. 30.—*Eyre v. Shelly*, 8 D. P. C. 185.
8. (*Examination*.) Under special circumstances, where an articled clerk proposes to practise abroad only, the Court will allow him to be examined before the expiration of his articles.—*Ex parte Twynam*, 8 D. P. C. 293.
9. (*Same*.) When an articled clerk, in consequence of extreme illness at the time of his examination, has been unable to obtain his certificate, the Court will allow him to go again before the examiners without the usual notices.—*Ex parte Grimstone*, 8 D. P. C. 304.
10. (*Taxation—Refunding to client*.) Where, on taxation, it appears that an attorney has been overpaid by his client, but the usual clause requiring the attorney to refund any sum found to have been overpaid is omitted in the order for taxation, the Court will not afterwards supply the omission.—*Peace v. Jones*, 8 D. P. C. 314.

11. (*Re-admission.*) Where an attorney has practised during the period of his being off the roll, and seeks to be re-admitted, he should state such practice in his affidavit, and not leave it to be stated by counsel.—*Ex parte Miller*, 8 D. P. C. 323.

BAIL.

- (*Deposit in lieu of—Rule to take money out of Court.*) Where a defendant has obtained judgment as in case of a nonsuit, a rule to pay out to him money deposited in lieu of bail is absolute in the first instance.—*White v. Urwin*, 8 D. P. C. 202.

BANKERS.

- (*Liability of.*) A. having received a sum of money bequeathed by will to his wife, gave it to her to take care of. The wife, without his knowledge, deposited it in a bank, in the name of her son by a former marriage, who was then an infant, and took from the bankers an accountable receipt in her son's name, bearing interest. Held, that the bankers were liable to A. for the amount, in an action for money had and received.—*Calland v. Loyd*, 6 M. & W. 26.

BANKING COPARTNERSHIPS' ACT.

- (*Pleading.*) In actions by the public officer of a banking copartnership it is sufficient in the declaration to describe the plaintiff as the duly appointed public officer of the company, without averring that the requisites of the 7 Geo. 4, c. 46, s. 4, have been complied with.—*Spiller v. Johnson*, 8 D. P. C. 868.

BANK OF ENGLAND.

- (*Liability of, for transferring stock.*) Case against the Bank of England for not transferring, according to the 28 Geo. 2, c. 9, s. 31, a share of Consolidated Annuities, the property of the plaintiff's testatrix. Pleas, 1. Not guilty; and 2. That the testatrix was not possessed. At the trial, it appeared that the testatrix, for many years before her death, was very old and infirm, and when she received her dividends, was accompanied by her nephew, a clerk in the Bank: he asked for the amount, and she signed receipts in the dividend warrants and in the Bank books. It appeared probable that he had paid her from time to time the dividends on her whole stock: but he had at intervals taken another woman to the Bank, who personated the testatrix, and forged her signature to several transfers. At the trial, the jury found that the testatrix was not proved to have had a knowledge of the transfers, but that she had the means of knowledge; that she was guilty of gross negligence in leading the Bank to believe that she sanctioned the transfers; and that the Bank was not guilty of negligence, in transferring without more fully ascertaining her identity. Held, that the facts found constituted an answer to the action, and were available under the pleadings. (2 Bing. 393; Ry. & M. 375.)—*Coles v. Bank of England*, 2 P. & D. 521.

BANKRUPTCY.

- (*Retrospective operation of the 2 & 3 Vict. c. 29.*) On the 6th July, 1839, an execution was levied on the goods of A. On the 19th July the stat. 2 & 3 Vict. c. 29, came into force. A few days afterwards a fiat in bankruptcy issued against A., on an act of bankruptcy prior to the levy. Held, that the execution was protected by the statute.—*Edwards v. Lawley*, 8 D. P. C. 234.

BILLS AND NOTES.

1. (*Pleadings.*) To an action by indorsee against maker of a promissory note, he pleaded that before the making of the note in the declaration mentioned he made another note for the accommodation of the indorser, who indorsed it to the plain-

tiff; that when it became due, the defendant made the note in the declaration mentioned, and gave it to the indorser to take up such prior note. He then averred payment by the indorser to the plaintiff of the note in the declaration mentioned, and acceptance of it by the plaintiff. Held, that the only material part of the plea was payment of the note declared on, and that such payment might be proved without producing the note: and that all the averments as to the prior note were surplusage, of which the defendant was not bound to give any evidence.—*Shearm v. Burnard*, 2 P. & D. 565.

2. (*Pleadings—Consideration.*) A plea, to a count by indorsee against drawer of a bill of exchange, averred that the bill had been drawn and indorsed to I., for a specific purpose, and that I., in fraud of that purpose, had handed it to H., and H. to the plaintiff, not for good and valuable consideration, and that the plaintiff was not a bona fide holder:—Held, that this last allegation, connected with the rest of the plea, meant only that the plaintiff had not given good consideration for the bill, and that fraud in the plaintiff could not be given in evidence under it. (3 Bing. N. C. 400; 1 Bing. N. C. 409.)—*Uther v. Rich*, 2 P. & D. 579.
3. (*Alteration of—Stamp.*) Where a promissory note made by the defendant was altered by him after delivery of it to the plaintiff, by the insertion of the words "to order," and it appeared that the alteration was in pursuance of the original intention of the parties: Held that it did not make a new stamp necessary.—*Byrom v. Thompson*, 3 P. & D. 71.
4. (*Pleading—Evidence under non acceptit.*) In an action by first indorsee against the acceptor of a bill of exchange, plea non acceptit, evidence is not admissible to show that the drawer had forged the defendant's acceptance to other bills, that the drawer absconded, and that then several bills, some of them with forged acceptances, were taken from a box in his house by the plaintiff's brother and came into the possession of the plaintiff, unless it can be shown that the bill in question was one of such bills. To prove the forgery such evidence only can be received as would have been admissible on an indictment against the drawer for the forgery.—*Griffiths v. Payne*, 3 P. & D. 107.
5. (*Evidence of presentment.*) The holder of a bill of exchange sent a person on the day when it became due, to present it at the place to which it was addressed. The party so employed was informed by a woman whom he saw coming out of the house (who was shown to be a lodger there), that the acceptor had formerly lived there, but had recently quitted: Held, that this was evidence to go to the jury of a presentment to the acceptor, so as to charge an indorser. (4 B. & Ad. 624.)—*Buckstone v. Jones*, 1 Scott's N. R. 19.
6. (*Alteration of.*) A plea, that the defendant accepted a bill of exchange for 60*l.* in satisfaction of the plaintiff's demand, is not sustained by evidence that the defendant remitted to the plaintiff a stamp having upon it 60*l.* in figures in the margin, and an acceptance across—the bill appearing to have been altered in the figures, and filled up as a bill for 46*l.*, before the name of the plaintiff as drawer was attached to it.—*Baker v. Jubber*, 1 Scott's N. R. 26.
7. (*Notice of dishonour.*) The following letter was held not to be a sufficient notice of dishonour of a promissory note:—"This is to inform you that the bill I took of you, 15*l.* 2*s.* 6*d.*, is not took up, and 4*s.* 6*d.* expense, and the money I must pay immediately. My son will be in London (where defendant resided) on Friday morning." (1 Bing. N. C. 194; 4 B. & C. 339; 3 Bing. N. C. 688; 6 Ad. & E. 499; 2 M. & W. 799.)—*Messenger v. Southey*, 1 Scott's N. R. 180:

8. (*Actions on—Designation of defendant by initials only.*) The Court will not allow a distringas to go against a defendant in an action on a bill of exchange, which describes him by the initial only of his christian name, or a rule to compute if the affidavit be so entitled, unless an affidavit be produced showing that the defendant so signed the bill.—*Worley v. Cunningham*, 8 D. P. C. 139; *Hilbert v. Wilkins*, *ibid*.
9. (*Failure of consideration.*) To an action on a bill of exchange for 20*l.* 8*s.* 6*d.*, the defendant pleaded that it was agreed between him and the plaintiff that the plaintiff should do certain carpenter's work for the defendant for 63*l.*; that defendant paid plaintiff 43*l.* on account of the work, and accepted the bill on account of the residue: that plaintiff neglected to do certain part of the work, and did other part in an unworkmanlike manner; and that the 43*l.* paid was more than the value of the work done: Held a bad plea after verdict, as not showing a total failure of consideration for the bill.—*Priquet v. Larne*, 8 D. P. C. 174.
10. (*Pleading—Allegation of promise to pay.*) In an action on a promissory note, it is unnecessary to allege any promise to pay.

Declaration against the maker of a promissory note, with counts for goods sold, &c., and one general promise to pay on a day long after the note was due. Plea to the whole declaration, non assumpsit: Held bad.—*Donaldson v. Thompson*, 8 D. P. C. 209.

BOND.

(*To Marshal of Palace Court.*) The plaintiff declared on a bond given him as Knight Marshal of the Palace Court, which after reciting that the defendant was one of the bearers of the virges of the said Court, but conditioned that the defendant should take sufficient bail from all defendants arrested, and also obey the orders of the Court, it then alleged as a breach that he had taken insufficient bail in a certain action, and had disobeyed an order of the Court requiring him to pay the amount of the debt and costs in the said action: Held, that the Marshal was a trustee for the party damnified, and was entitled as such to recover the full amount of debt and costs.—*Lamb v. Vice*, 8 D. P. C. 361.

CERTIORARI.

1. (*Costs on.*) The prosecutor of an indictment removed by certiorari is only entitled, under 5 W. & M. c. 11, s. 3, to the costs of the counts on which the defendant is convicted.—*Reg. v. Hawdon*, 3 P. & D. 44.
2. (*When taken away.*) By the provisions of a railway act, in case the company should not be able to agree with the owners of land upon the price to be paid for it, the company were to issue their warrant to the sheriff of the county in which the lands should be, and if such sheriff should be interested in the question, to any of the coroners in the county, or if they should be interested, then to some other person who had served one of the above offices and should not be interested, to empanel a jury to appear before such sheriff, undersheriff, coroner, or other person for the purpose of assessing and giving a verdict for the sum of money to be paid: such sheriff, undersheriff, &c. to give judgment for the sum assessed, which was to be binding and conclusive: the verdict and judgments, being first signed by the sheriff, undersheriff, &c., to be deemed records to all intents and purposes. There was also a clause taking away certiorari as to any proceeding in pursuance of the act: Held, that the clause taking away the certiorari applied, although an inquisition had been taken before a person whom the

- sheriff had appointed his deputy for the purpose of taking it.—*Reg. v. The Sheffield and Manchester Railway Company*, 3 P. & D. 111.
3. (*Entitling affidavits on.*) Affidavits in support of an application to quash a certiorari, bringing up an order of justices for stopping up a road, must be entitled in the names of the parties in the proceedings, and not merely "In the Queen's Bench."—*Reg. v. Jones*, 8 D. P. C. 80.
 4. (*In criminal case.*) To remove an indictment for misdemeanor by certiorari into the Q. B., the rule is absolute in the first instance; but in the case of felony, it is nisi only.—*Reg. v. Spencer*, 8 D. P. C. 127.
 5. (*Same.*) In order to support a motion for a certiorari to remove an indictment for perjury from the Central Criminal Court, it must be shown what are the points of difficulty likely to arise on the trial.—*Reg. v. Josephs*, 8 D. P. C. 128.

COGNOVIT.

1. (*Attestation.*) An attestation to a cognovit in this form—"Witness George Edwards, defendant's attorney, named by him and attending at his request"—is not sufficient under 1 & 2 Vict. c. 10, s. 9, as the attorney should proceed to declare that he subscribes as such attorney.—*Poole v. Hobbs*, 8 D. P. C. 113.
2. (*Consideration.*) A defendant having been taken in execution, in consideration of his discharge gave the plaintiff a cognovit for debt and costs: Held, that the cognovit was valid, if founded on a writ previously issued, and if no writ had been issued, it was incumbent on the defendant to show that fact.—*Shawdy v. Colwell*, 8 D. P. C. 373.

COINING.

1. An indictment under 2 W. 4, c. 34, s. 15, charging the gilding sixpences with materials capable of producing the colour of gold, is good, and supported by proof of colouring sixpences with gold.—*Reg. v. Turner*, 2 Moo. C. C. 42.
2. (*Joint possession.*) When pieces of counterfeit coin are found on one or two persons acting in guilty concert and both knowing of the possession, both are guilty under 2 W. 4, c. 34, s. 8.—*Reg. v. Rogers*, 2 Moo. C. C. 85.

COMMITMENT.

1. (*For further examination, when it is an excess of jurisdiction.*) The plaintiff was taken before a magistrate, and by him committed for further examination on a charge of felony, viz, the unlawfully cutting trees: Held, that this was no excess of jurisdiction, although it did not appear that the amount of the injury exceeded 20s., as is required to constitute the offence a felony by the 7 G. 4, c. 30, s. 19.

The reasonableness of the period of commitment for examination is a question for the jury.—*Cave v. Mountain*, 1 Scott's N. R. 132.

2. (*Under 4 G. 4, c. 34, s. 3, when sufficient.*) The plaintiff was committed by the defendant, a magistrate, under the 4 G. 4, c. 34, s. 3, by a warrant of commitment which was in the following form:—"To the constable of M., Surrey, &c. Whereas information and complaint hath been made unto me, one &c., upon the oaths of J. H. and S. M., both of M., in the said county of Surrey, calico-printers, that W. J. of M. aforesaid, in the county aforesaid, calico-printer, did on Wednesday, the 8th of May inst., contract with the said S. M. to print certain pieces of woollen cotton goods, and that the said W. J. had adopted such contract, and entered into the service of the said S. M. under such contract; and that the said W. J. hath, in his said service, been guilty of divers misde-

meanours, miscarriages, and ill-behaviour towards the said S. M., and particularly with having, on the 9th of May inst., refused to perform such contract, and left his said work unfinished, and the service of the said S. M., without his license or consent. And whereas, in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegation of both the said parties, touching the matter of the said complaint, and, upon due consideration had thereof, have adjudged and determined, and do hereby adjudge and determine, the said complaint to be true." It then commanded the constable to convey the plaintiff to the house of correction, and deliver him to the keeper thereof, who was ordered to detain him in custody: Held, that this was a commitment in execution, and that it was bad, because it did not show, either that the contract was entered into, or the work refused to be done, or the plaintiff found, within the jurisdiction of the magistrate.—*Johnson v. Reid*, 6 M. & W. 124.

COMPOUNDING FELONY.

A person may be convicted under 18 Eliz. c. 5, s. 4, of taking money, &c., though in fact no offence liable to a penalty has been committed by the person from whom the money is taken.—*Reg. v. Best*, 2 Moo. C. C. 124.

CORONER'S INQUISITION.

1. Where a coroner's inquest found that, on, &c., A. B. being on board a certain steam-boat, which was then and there being floated and navigated on the river Thames, it so happened that a certain boiler, then and there forming part of a certain steam-engine in and on board of the said steam-vessel, which said boiler was then and there used in the working of the said steam-engine, burst and exploded, and the boiling water was thereby cast upon A. B., whereby A. B. then and there received a mortal shock and concussion, of which said mortal shock, &c. A. B. instantly died: Held, that the day of the explosion and of the death did not sufficiently appear, and the Court therefore quashed the inquisition.

Semble, that if the jurors' names be set out at full length in the caption of an inquisition, it is immaterial whether they sign at the foot with the initials only of their christian names.—*Reg. v. Brownlow*, 3 P. & D. 52; 8 D. P. C. 157.

2. Where a death occurs in the county of W. from an injury received in the county of S., the coroner's inquest is rightly held in the County of W.

Quære, whether a deadland can be levied under a coroner's inquisition which sets out that the death was caused by the negligence of the party on whom the deadland is assessed.—*Reg. v. Grand Junction Railway Company*, 3 P. & D. 57, n.

3. Where a party was in custody on a charge of manslaughter, the deceased being a married woman, whose husband had deserted her, and no next of kin could be discovered, service of a rule for bailing the prisoner, upon the coroner, was held to be sufficient.—*Reg. v. Williams*, 8 D. P. C. 301.

CORPORATION.

1. (*Admission—Declaration under 9 Geo. 4, c. 17, s. 2.*) A party elected to a corporate office must make the declaration required by the 9 Geo. 4, c. 17, s. 2, to be made "within one calendar month next before or upon his admission," before he can claim to be admitted: and if he refuse to make the declaration, the election is void.—*Humphery v. The Queen*, 2 P. & D. 691. [Overruling the judgment of the Court of Queen's Bench, 2 N. & P. 681.]
2. (*Inspection of corporation documents.*) A lessee of a corporation elected to pay an increased rent, pursuant to the finding of a jury under the 5 & 6 Will. 4,

c. 76, s. 97, and indorsed the finding of the jury on his part of the original lease. In an action for the increased rent, the lessee was compelled to produce his part of the lease for the inspection of the corporation, and to allow a copy of the indorsement to be taken, although it was admitted that the original lease was still in the possession of the corporation, as well as the inquisition taken before the jury.—*Mayor of Arundel v. Holmes*, 8 D. P. C. 118.

3. (*Same.*) On a dispute between the freemen and corporation of a borough, as to the right of cutting trees on certain pastures formerly granted to the corporation, an injunction to restrain the cutting of the trees having been obtained by the corporation, the Court, at the instance of the freemen, granted a mandamus to permit them to inspect the deeds, &c. relating to the pastures in question in possession of the corporation, with a view to dissolve the injunction.—*Reg. v. Mayor of Beverley*, 8 D. P. C. 140.
4. (*Election of mayor.*) The election of a person as mayor for the year immediately succeeding that during which he has served the office, is void under the 9 Ann. c. 20, s. 8, and the Court will grant a mandamus to proceed to another election, pursuant to the 7 Will. 4 & 1 Vict. c. 78, s. 26.—*Reg. v. Corporation of Pembroke*, 8 D. P. C. 302.

COSTS.

1. (*In trespass.*) Since the recent rule, not allowing special matter to be given in evidence under the plea of not guilty, unless "by statute" is inserted in the margin, the plaintiff who obtains a verdict in an action *quare clausum fregit*, to which not guilty merely is pleaded, omitting the words "by statute," is entitled to his full costs without a certificate under 22 & 23 Car. 2, c. 9, and although the judge certify under 43 Eliz. c. 6.—*Jones v. Thomas*, 3 P. & D. 91; 8 D. P. C. 99.
2. (*Middlesex County Court Act.*) To entitle a defendant to a suggestion for double costs under the Middlesex County Court Act, 23 Geo. 2, c. 33, s. 19, his affidavit need not show affirmatively that the cause of action arose within the jurisdiction; it is enough, provided the contrary do not appear on the other side, if the affidavits state that the defendant, at the time of bringing the action, resided within the jurisdiction, and was liable to be summoned to the local court.

A suggestion cannot be entered, where any part of the cause of action appears to have arisen out of the jurisdiction of the county court. (1 Saund. 74 a; 2 H. Bl. 29; 6 T. R. 175; 8 T. R. 235; 1 Bos. & P. 75.)—*Thom v. Chinnock*, 1 Scott's N. R. 138.

3. (*Costs in the cause, what are.*) *Quære*, whether the costs of inrolling the proceedings under a fiat are properly costs in the cause?

At all events they are not so, where the inrolment takes place after the defendant has pleaded without giving notice to dispute the bankruptcy, even though he afterwards, under a leave to plead *de novo*, delivers such notice.—*Butcher v. Addison*, 1 Scott's N. R. 175.

4. (*Taxation—Allowance for loss of time, &c.*) The master, on taxation, allowed 40*l.* for expenses and loss of time to a gentleman from the office of the Accountant-General of the Court of Chancery in Ireland, who was called to produce an order of the Court, and a power of attorney enabling the defendant to obtain a transfer of certain stock then standing in the name of the Accountant-General, and also to prove the course of business in the office on the subject: Held, that the allowance was properly made.—*Story v. Houlditch*, 1 Scott's N. R. 206.
5. (*In the cause, what are.*) In a cause in which the venue was laid in Middle-

sex, the Court, on the 30th of January, made absolute a rule for changing the venue obtained by the defendant, "on payment of the costs of the application and of all costs reasonably and bona fide incurred and rendered useless by that rule." The plaintiff's witnesses were at that time on their way from Wales to London, the sittings commencing on the 1st of February. The defendant drew up the rule and served it on the plaintiff, and served notice of taxation for the 1st of February. The plaintiff thereupon withdrew the record, and sent back her witnesses into the country. On the 8th of February the costs were taxed under the rule at 20*l.* 11*s.*; on the 11th the defendant gave notice that he abandoned the rule, and the Court held that he had a right to do so, the rule being only conditional. The cause was tried at the Middlesex sittings after Trinity term, and a verdict found for the plaintiff: Held, that the 20*l.* 11*s.* were not, under the circumstances, costs in the cause.—*Pugh v. Kerr*, 6 M. & W. 17; 8 D. P. C. 218.

6. (*Security for.*) An application to compel the plaintiff to give security for costs, on the ground of his residing out of the jurisdiction of the Court, may be made after an order has been obtained for time to plead on the usual terms. (3 D.P.C. 559.)

But the Court will not grant such an application where the plaintiff, though a foreigner and usually resident abroad, is at the time actually in this country. (6 Taunt. 20.)

Semble, that the affidavit to ground such an application is sufficient, if it states that the deponent *believes* the plaintiff resides abroad.—*Dowling v. Harman*, 6 M. & W. 131; 8 D. P. C. 165.

7. (*In trespass.*) Where, in trespass *quare clausum fregit* for an assault, the defendant pleads the general issue only, and the plaintiff recovers less than 40*s.* damages, he is entitled to full costs since the rule of T. T. 1 Vict. (2 C. M. & R. 663; 3 M. & W. 288.)—*Jones v. Thomas*, 8 D. P. C. 99.

8. (*Same.*) In trespass for assault and false imprisonment, the defendant pleaded, as to the seizing and laying hold of the plaintiff, that it was done to prevent a breach of the peace. The jury found a verdict for the plaintiff, with one shilling damages, and the judge certified under the 43 Eliz. c. 6, s. 2: Held, that as a battery was admitted on the face of the record, the judge had no power to certify, and therefore that the plaintiff was entitled to his costs. (3 M. & W. 28.)—*Scruton v. Taylor*, 8 D. P. C. 110.

9. (*Security for.*) After verdict for the plaintiff, and a rule for a new trial made absolute, he became bankrupt. The Court compelled him to give security for costs, though there was no affidavit that the action was carried on for the benefit of the assignees. (2 D. P. C. 61; 6 D. P. C. 227.)—*Denton v. Williams*, 8 D. P. C. 123.

10. (*Under 43 Geo. 3, c. 46.*) After costs taxed and judgment signed for the plaintiff, the Court will not entertain an application for costs under the 43 Geo. 3, c. 46, s. 3.—*Rennie v. Yorston*, 8 D. P. C. 326.

11. (*Delivery of bill before taxation.*) The rule of the Exchequer, which requires the delivery of a copy of the bill of costs and affidavit of increase one day previous to taxation, is not complied with by one day's previous delivery of the copy of an affidavit of increase not sworn until the day of taxation.—*Todd v. Fellingham*, 8 D. P. C. 372.

COUNTY TREASURER.

The entire order of a Court to pay the expences of a prosecution made under the 7 Geo. 4, c. 64, s. 26, must be served on the county treasurer. Where the order made was to pay an aggregate sum the details being annexed, and the attorney tore off the paper containing the details: Held, that the treasurer was justified in refusing to pay.—*Reg. v. Jones*, 2 Moo. C. C. 171.

COVENANT.

1. Covenant does not lie against the chairman of the board of directors of a joint stock company, not incorporated by act of parliament, upon a deed under the seal of a former chairman.—*Hall v. Bainbridge*, 1 Scott's N. R. 151.
2. (*To insure, what is a breach of.*) A declaration stated that by indenture the defendant covenanted that he would at any time or times thereafter appear at an office or offices for the insurance for lives within London or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and should not afterwards do or permit to be done any act whereby such insurance should be avoided. It then alleged the defendant's appearance at the Rock Life Insurance Company, and that the plaintiff insured the defendant's life with that company, by a policy containing a proviso that if the defendant went beyond the limits of Europe, the policy should be void; breach, that the defendant went beyond the limits of Europe: Held, on special demurrer, that the declaration was bad, for want of an averment, that the defendant had notice that the policy was effected.—*Vyse v. Wakefield*, 8 D. P. C. 377.

CUSTOMS.

(*Liability of collector of customs to action—Duties on wreck.*) By the 3 & 4 Will. 4, c. 51, s. 2, the crown may appoint commissioners for managing and collecting the customs; by s. 6, these commissioners may appoint persons to execute the duties of the several offices necessary to such management and collection, under the control of the commissioners; and by s. 7, every person so employed on any duty or service is to be deemed the officer of the customs for that duty or service. The defendant was employed under the above act, and the 3 & 4 Will. 4, c. 52, s. 18; his duty being to collect the duty on any goods for which an entry should be tendered, and upon payment of the duty to sign a bill of entry as a receipt, the same being a warrant for delivery of goods from the proper officer: Held, 1st, that the defendant filled a ministerial office, and was a substantive officer of the crown, not merely the servant of the commissioners; 2d, that he was liable in case for refusing to sign a bill of entry for a person who had tendered the duty payable on his goods, (6 T. R. 646; 5 Ad. & El. 381; 3 Brod. & B. 275.)

By the 3 & 4 Will. 4, c. 52, s. 50, "All foreign goods, derelict, jetsam, flotsam, and wreck, brought or coming into the united kingdom," are subject to the same duties as imported goods of the like kind, "provided that all such goods as cannot be sold for the amount of duty due thereon shall be delivered over to the lord of the manor, or other person entitled to receive the same, and shall be deemed to be unenumerated goods, and be charged with duty accordingly." Held, that the word *wreck* was not to be construed in the limited sense of goods forfeited for want of due claim by their owner; and that foreign goods, which after they had been imported into this country, warehoused and entered for exportation to Antwerp, were shipped and consigned thither, and, the ship

having gone to pieces at the commencement of the voyage, were thrown on the English coast, were *wreck* within the meaning of the clause, although claimed within a year and a day, and never in any other hands: and that, as they could not be sold for the amount of duty payable thereon, they were also within the proviso, and not liable to any other duty than that on unenumerated goods.—*Barry v. Arnaud*, 2 P. & D. 633.

DETINUE.

1. If one joint tenant bring an action of detinue, the objection that the other tenant should have joined can be taken only by plea in abatement.—*Broadbent v. Ledward*, 3 P. & D. 45.
2. (*Pleading*.) The plea of non detinet merely puts in issue the simple fact of detainer, and if the defendant relies upon a justifiable detainer, he must plead it specially.—*Richardson v. Frankum*, 8 D. P. C. 347.

DEVISE.

(*To trustees, when it gives legal estate.*) Devise,—I give all that my manor of M., and my capital mansion to E. and L., in trust to permit and suffer my wife, in case she wish so to do, to occupy the same, and receive the rents, issues, and profits thereof, until my son M. shall attain the age of twenty-one, provided my said wife continues unmarried, and upon the attainment to age of my said son, then in trust to release the said manor, mansion house, &c. unto the use of my said son, &c. provided that in case my said wife marrying again or not wishing to reside in my said mansion house, the trustees to let the same at the best rent, &c.: Held, that on the wife's taking possession, the legal estate in the manor (though not in the manor-house) vested in the wife during her widowhood, and until her son's majority.—*Doe d. Noble v. Bolton*, 3 P. & D. 135.

EJECTMENT.

1. (*Service*.) Service on the premises will be dispensed with, where access to them is prevented by the tenant.—*Doe d. Barrow v. Roe*, 1 Scott's N. R. 25.
2. (*Same*.) Where there were seven tenants, five only of whom had been duly served (they not being joint tenants), the Court granted a rule only as against the five served.—*Doe d. Slee v. Roe*, 8 D. P. C. 66.
3. (*Same*.) In ejectment to recover land illegally taken into a road under a private act of parliament, the Court refused a rule for judgment against the casual ejector, on affidavit that service had been effected on one of the commissioners, in whom the road was vested under the provisions of that act, and on their clerk.—*Doe d. White v. Roe*, 8 D. P. C. 71.
4. (*Same*.) Service on the secretary of the East India Company, in respect of premises sought to be recovered from the company, held sufficient.—*Doe d. Coopers' Company v. Roe*, 8 D. P. C. 134.
5. (*Same*.) Service on the premises, on a woman who represented herself as the tenant's wife, and was reputed to be so, and was living with him, held sufficient for a rule nisi. (4 M. & P. 11.)—*Doe d. Bremner v. Roe*, 8 D. P. C. 135.
6. (*Same*.) In ejectment for a chapel and school-room, service on the person in occupation of the school-room, and on the person who paid the rates, &c. of the chapel, held sufficient for a rule nisi.—*Doe d. Earl Somers v. Roe*, 8 D. P. C. 292.
7. (*Same*.) Service on the daughter of a bed-ridden tenant, on the premises, held sufficient for a rule nisi.—*Doe d. Frost v. Roe*, 8 D. P. C. 301.

8. (*Same.*) Service on the wife on the premises, although a copy of the declaration was not left with her, she refusing to take it, held sufficient for a rule nisi.—*Doe d. Nash v. Roe*, 8 D. P. C. 305.
9. (*Same.*) Service on the nephew of the tenant on the premises, where the latter refused to be seen: Held sufficient for a rule nisi.—*Doe d. Moody v. Roe*, 8 D. P. C. 306.
10. (*Affidavit under 1 Geo. 4, c. 87.*) An affidavit in support of a rule under the 1 Geo. 4, c. 87, must state at length the names of *all* the lessors of the plaintiff; it is not sufficient to entitle it. "*Doe d. P. and another v. Roe*," (7 D. P. C. 531).—*Doe d. Pryme and another v. Roe*, 8 D. P. C. 340.
11. (*Service—Notice of Declaration.*)—It is no objection to the notice at the foot of the declaration, that it omits the word "Term" after "Hilary."—*Doe d. Dimond v. Roe*, 8 D. P. C. 308.

ELECTION PETITION.

A rule for entering up judgment on the speaker's certificate, pursuant to 9 Geo. 4, c. 22, s. 63, is nisi in the first instance.—*Bailey v. Bond*, 8 D. P. C. 119.

EMBEZZLEMENT.

A coachman, employed by one proprietor of a coach to drive a certain part of the journey and to receive money and hand it over to him, may be charged with embezzling the money of that proprietor, though the money when received by him would belong to him and his partners.—*Reg. v. White*, 2 Moo. C. C. 91.

ESCAPE.

Where a plea to an action for an escape, against the marshal of the Queen's Bench, stated that the plaintiffs fraudulently and covinously conspired with L. and others to arrest A. B., a prisoner on final judgment within the rules at the suit of the plaintiffs, if he should go beyond the limits of the rules, and detain him beyond the limits till the marshal should be served with process for the escape; and the proof was that one U., at whose suit also the prisoner was detained on mesne process, by trick and contrivance caused the prisoner to be arrested at the suit of L., and detained beyond the limits of the rules, during which time U. served the marshal with a writ in the present action, and facts were proved to show a connection between U. and the plaintiffs: Held, that as the plaintiffs adopted U.'s agency by prosecuting this action, it was a question for the jury whether the plaintiffs were not parties to U.'s trick and contrivance, although they did not personally interfere in it.

The plea alleged, that *while* A. B. intended and was about to return to the said rules, the plaintiffs, and others in collusion with them, in further pursuance of the fraudulent contrivance, &c., wrongfully caused A. B. to be arrested and detained, until a writ could be sued out and served on the marshal in this action: and alleged that if A. B. had not been so collusively and illegally arrested and detained, he *could* have returned to and been within the rules before the commencement of the suit: Held, that on this plea the plaintiffs were entitled to judgment non obstante veredicto.—*Merry v. Chapman*, 3 P. & D. 25; 8 D. P. C. 81.

EVIDENCE.

1. (*Notice to produce—Secondary evidence.*) The plaintiff had given the defendant notice to produce certain letters written by the defendant to his partner in New South Wales, and had called upon him to admit an extract from a letter book kept by the defendant (describing it): Held, that the letters contained in the book were secondary evidence of those described in the notice, although no other

proof was given that the letters had been actually sent: Held also, that the defendant was not entitled to read other letters contained in the letter book.

The notice to produce was served four days before the trial. The action was commenced in 1832, and proceedings had taken place in Chancery also in respect of the subject-matter of the letters: Held, that they must be presumed to have been sent back from New South Wales, and that the notice was therefore sufficient to let in secondary evidence.

The fact of copies of letters being kept in a merchant's letter book, is evidence against him of the letters having been sent.—*Sturge v. Buchanan*, 2 P. & D. 573.

2. (*On question of boundary—Award—Ancient presentment by homage.*) In an action which turned upon a question as to the boundary of two manors, a verdict was taken for the plaintiff, subject to the award of an arbitrator, who was to determine for which party the verdict was to be finally entered, and to set out the boundaries. He directed the verdict to be entered for the defendant. In a subsequent action by the defendant against a third party, where also the question substantially was as to the boundary of the same manor, the verdict was held receivable, but the award not, as evidence of reputation.

An ancient presentment by the homage of a manor, in form of a book, set out the boundaries of the manor, and then gave in alphabetical order the names of the several parishes within it, and of the tenants resident in each parish; but this part of the presentment contained nothing as to boundaries. Two or three sheets at the concluding part of it, where the parish of Y. should have followed in order, had been cut off, but it did not appear under what circumstances. In an action involving a question as to the boundary of the manor, where it was admitted that the manor and Y. were conterminous in the direction of the locus in quo, the presentment was admitted in evidence of the reputed boundary, as the document, although mutilated, was perfect in that part of it which related to the subject of the boundary.—*Evans v. Rees*, 2 P. & D. 626.

3. The plaintiff, the secretary of a joint stock bank in London, with a branch at D., went with the cashier to the latter place with a paper purporting to be an order upon the party having the charge of the branch bank to deliver up to them the books and money in his custody; the defendant, one of the directors of the bank, seeing a light in the bankinghouse at an unusual hour went there, and not being satisfied of their authority to act as they were doing, placed the plaintiff and the cashier in the custody of a policeman, who handcuffed them and put them in the cage for the night. In an action for false imprisonment, evidence that the defendant had on the following morning gone to the bankinghouse in London, broken open the desks of the secretary and cashier, and abstracted papers, for the purpose (as was suggested) of depriving them of the means of justifying their conduct, was held to have been properly received. The defendant having in mitigation of damages called witnesses to prove that nearly all the money in bank at D. at the time of the transaction was composed of his own balance, the plaintiff was permitted to cross-examine them generally as to the existence of bill transactions between the defendant and the bank in London, for the purpose of insinuating, that though the local balance was in the defendant's favour the general balance might be against him: Held, that this was no ground for a new trial.—*Edgell v. Francis*, 1 Scott's N. R. 118.
4. (*Notice to produce.*) A notice to produce in sufficient time on the party himself, is sufficient, though he have employed an attorney in the cause. And it is not

invalidated by a subsequent bad service of notice on the attorney.—*Hughes v. Budd*, 8 D. P. C. 315.

5. The examination of a person taken on oath as witness before commissioners of bankruptcy, is admissible against him on a charge of forgery, he having been cautioned and allowed to elect what questions he would answer.—*Reg. v. Wheeler*, 2 Moo. C. C. 45.
6. (*Dying declarations*.) The declarations of a child of ten years old, made under the apprehension and expectation of immediate death, held receivable.—*Reg. v. Perkins*, 2 Moo. C. C. 135.

EXECUTION.

1. (*Goods held in right of lien cannot be taken in*.) Property held by a party in right of a lien cannot be taken in execution.
In trover, the declaration alleged that the plaintiff was lawfully possessed of the goods "as of his own property;" and the replication, in answer to a special plea in justification, set up a right to the possession of them in respect of a lien: Held, that this was not a departure.—*Legg v. Evans*, 6 M. & W. 36; 8 D. P. C. 177.
2. (*Fieri facias, what may be taken under*.) A party privileged from arrest having been taken on a ca. sa. by the sheriff of G., paid the money to the sheriff, and obtained a judge's order to have it refunded. When the town agent was about to do so, the money was claimed by the sheriff of M., under a fi. fa. against the same party directed to him: Held, that it could not be taken under this fi. fa.—*Masters v. Stanley*, 8 D. P. C. 169.
3. (*Fieri facias, not issuable after death of defendant—Fraction of a day*.) Where a defendant died at 11 a. m.; and a fi. fa. was sued out at 2 p. m. the same day: Held irregular.—*Chick v. Smith*, 8 D. P. C. 337.

FORCIBLE ENTRY.

- (*Award of restitution*.) In order to authorise a justice to award restitution, pursuant to an inquisition taken under the 8 Hen. 6, c. 9, for a forcible entry, the inquisition should set forth the estate possessed by the party in the property disputed.—*Reg. v. Bowser*, 8 D. P. C. 128.

FOREIGN ATTACHMENT.

- (*Proceedings in*.) The proceedings by foreign attachment in the Tolzey Court Bristol, as set out upon error, appearing to have been commenced without issuing and returning a writ of summons, the Court set aside the judgment therein, at the instance of the garnishee. (3 Wils. 297; 2 W. Bla. 834.)—*Bruce v. Wait*, 1 Scott's N. R. 81.

FORGERY.

1. (*Of request for goods*.) A forged letter, requesting a tradesman to deliver goods to A. B. on his credit, and vouching for his ability to pay, may be described as a request within 11 Geo. 4 and 1 Will. 4, c. 66, s. 10; though the supposed writer have no authority over or interest in the goods, and A. B. only be looked to for payment.—*Rex v. Thomas*, 2 Moo. C. C. 18.
2. (*Felonious uttering*.) Knowingly uttering a bill of exchange, all the names on which are fictitious, is within the forgery statutes, though the party uttering intended to provide for the payment of the bill, the fact of the parties not being real being unknown to the person taking the bill.—*Reg. v. Hill*, 2 Moo. C. C. 30.

3. A prisoner convicted, or confessing to an indictment for uttering a forged "order," ought not to have judgment passed, if it appears that the person whose name is forged had no authority to order, and the writing merely purports a request.—*Reg. v. Newton*, 2 Moo. C. C. 59.
4. (*Uttering of bill.*) An indictment for uttering a forged bill of exchange is supported by proof of uttering an instrument in form of a bill with a forged acceptance on it, though there be no person named as the drawee of the bill.—*Reg. v. Hawkes*, 2 Moo. C. C. 60.
5. (*Undertaking to pay money, what is.*) A written promise to pay a sum specified, or such other sum not exceeding the same as A. B. may incur by reason of suretyship, is an undertaking to pay money within 11 Geo. 4 and 1 Will. 4, c. 66.—*Reg. v. Reed*, 2 Moo. C. C. 62.
6. (*Forgery of order for payment of money.*) A charge of forging, &c., an order for the payment of money, is supported by proof of a foreign letter requesting a correspondent of the supposed writer in England to advance money, it being proved that such letters are in the course of business treated as orders.—*Reg. v. Roake*, 2 Moo. 66.
7. It is no defence on an indictment for forging and uttering an order of a board of guardians of a poor law union to show that the person who signed the order as presiding chairman was not in fact chairman on the day he signed, the forgery charged being of another name in the order.—*Reg. v. Pike*, 2 Moo. C. C. 70.
8. (*Of letter of attorney for receipt of pension.*) An indictment for forging, &c. any letter of attorney, &c. relating to a pension supposed to be payable under 7 Geo. 4, c. 16, s. 8, is good. It is not necessary that the pension to which the document relates should be actually existing.—*Reg. v. Pringle*, 2 Moo. C. C. 122.

FRAUDS, STATUTE OF.

1. (*Contract for interest in land.*) The defendant agreed to give the plaintiff 45*l.* for a crop of corn and potatoes then growing in his field, and the stubble afterwards, and whatever *lay grass* was in the field; the defendant to harvest the corn and dig the potatoes, and the plaintiff to have the liberty of turning in his own cattle, and to pay the tithes: Held, that this was not a contract for the sale of an interest in land: for that the growing crops were mere chattels; and, with regard to the grass, as the plaintiff did not part with his possession of the soil, the contract was to be construed as an agistment of the defendant's cattle by the plaintiff. (5 B. & C. 829.)—*Jones v. Flint*, 2 P. & D. 594.
2. (*Goods, &c. within s. 17, what are.*) A contract for the sale of shares in a banking company of 10*l.* value, is not a contract for the sale of goods, wares, or merchandise, so as to require a written memorandum within the 17th section of the Statute of Frauds.—*Humble v. Mitchell*, 3 P. & D. 141.
3. (*Contract for sale of interest in land—Pleading.*) Plea to an action of debt by the payee against the maker of a promissory note payable on demand, that the note was given as and for the purchase-money to be paid to the plaintiff for land agreed to be sold by the plaintiff to the defendant, and that no memorandum or note of the contract in writing was signed by the defendant, or any person lawfully authorized by him; and that there was not any consideration or value for the making or payment of the note, except as aforesaid: Held bad on general demurrer.

The plaintiff replied, that after the making of the contract, the defendant paid

part of the purchase-money, and was let into possession, and that the plaintiff had always been ready and willing to execute a conveyance. *Quære*, whether this replication was bad for multifariousness.—*Jones v. Jones*, 6 M. & W. 84.

4. (*Variation of written contract by parol.*) The terms of a written contract for the sale of goods, falling within the operation of the Statute of Frauds, cannot be varied or altered by parol; and where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose, must, in order to be valid, be in writing. (5 B. & Adol. 58; 2 P. & D. 447.)—*Marshall v. Lynn*, 6 M. & W. 109.

GAOL ACTS.

1. Where a grant of quarter sessions has been made by the crown under 5 & 6 Will. 4, c. 76, to a newly incorporated borough without a gaol, the town council have no power under 5 Geo. 4, c. 85, and 5 & 6 Will. 4, c. 76, to contract with the justices of the county to send the borough prisoners to the county gaol.
2. An order of sessions empowering county justices to contract for the maintenance of borough prisoners, under 5 Geo. 4, c. 85, and 5 & 6 Will. 4, c. 76, held not to be an order under the latter statute so as to take away the certiorari.
3. A notice of application for a certiorari to remove an order of justices relating to the gaols of M., signed by "A. and B., solicitors for W. G., a rate payer of M.," is good under 13 Geo. 2, c. 18.—*Reg. v. Justices of Lancashire*, 3 P. & D. 86.

GUARANTIE.

- (*Whether continuing—Pleading.*) Debt against one of the obligors of a joint and several bond. By the condition, which recited an agreement by the plaintiffs, a banking firm, to discount bills, and otherwise advance to one of the obligors any sums of money not exceeding at any one or more time or times 200*l.* upon security, the bond was to be void if the obligors, or any or either of them, shall pay to the plaintiffs, and any other person who shall become a partner in the firm, all such sums not exceeding 200*l.* as the plaintiffs or any future partner should advance the obligor on bills, &c. which he might from time to time draw upon plaintiffs, or get discounted by them, within three months after notice to pay such sums: Held, first, that the bond was a continuing security; secondly, that an averment that 200*l.* was due, and that notice thereof had been given to the defendant, was no notice to him to pay, and so the non-payment by him no breach of condition shown, and that this objection was open on general demurrer.—*Batson v. Spearman*, 3 P. & D. 77.

HIGH CONSTABLE.

- (*Appointment of, in whom vested.*) The appointment to the office of high constable lies in the justices at large, and may be exercised by the justices at quarter sessions, where all the justices have the opportunity of being present and voting, but not at petty sessions.—*Reg. v. Watkinson*, 2 P. & D. 617.

HIGHWAY ACT.

- (*Notice of appeal under.*) On an appeal against a conviction by two justices under the Highway Act, 5 & 6 W. 4, c. 50, s. 105, notice of appeal must be given to both justices.—*Reg. v. Justices of Bedfordshire*, 3 P. & D. 21; see *Reg. v. Justices of Cheshire*, *ib.* 23, n.

ILLEGAL CONTRACT.

- (*Agreement by peer to withdraw his opposition to a railway bill, how far legal.*) By an agreement between certain shareholders of a projected railway, and a peer of

parliament, through whose lands it was to pass, it was stipulated, on the one hand, that he should withdraw his opposition to a bill then before parliament for making the railway according to a certain line, and, on the other hand, that they would apply in the next session for a deviated line; and that in case the bill then before parliament for the original line should pass during that session, they would, within six months after its passing, pay him 5000*l.* as compensation for the damage his estate would sustain by the deviated line, without prejudice to the further compensation to be paid him in the event of the deviated line not being adopted: Held, by the Court of Exchequer Chamber (reversing the judgment of the Court of Q. B.), that this agreement was not illegal on the ground that it had been concealed from parliament, it not appearing on the face of the agreement, or by the averments in pleading it, that it was the *intention* of the parties, at the time of making it, to conceal the agreement. And, on the same ground, that its concealment from the other landowners did not vitiate it.

Quære, whether such intention would have vitiated it.—*Lord Howden v. Simpson*, 2 P. & D. 714, 731.

INDICTMENT.

(*Conclusion of—Allegation of contra formam statuti.*) The omission of *contra formam*, &c. in an indictment for a statutable offence, is good ground for an arrest of judgment, and is not cured by 7 Geo. 4, c. 64, ss. 20, 21.—*Reg. v. Radcliffe*, 2 Moo. C. C. 68.

INFANT.

(*Liability of—Necessaries, what are.*) To a declaration for goods sold, &c., the defendant pleaded his infancy, to which the plaintiff replied that the goods were *necessaries* suitable to the degree, estate, and condition of the defendant: Held, that the term *necessaries* included such things as were useful and suitable to the state and condition in life of the party, and not merely such as are requisite for bare subsistence.

It is a question for the jury, whether the articles are such as a reasonable person, of the age and station of the infant, would require for real use.—*Peters v. Fleming*, 6 M. & W. 42.

INSOLVENT.

1. (*Replication to plea of Insolvent Act.*) To a plea alleging that the plaintiff has taken the benefit of the Insolvent Debtors' Act since the commencement of the suit, a replication that the action is carried on for the benefit of his assignees is bad. (1 Chit. R. 215; 15 East, 622.)—*Swann v. Sutton*, 2 P. & D. 533.

2. (*Process against.*) An insolvent remanded under the act may be detained by writ of *capias*, without a judge's order, or a writ of summons being first issued. (1 & 2 Vict. c. 110, s. 85; 7 D. P. C. 146.)—*Growcock v. Waller*, 8 D. P. C. 146.

INTERPLEADER ACT.

(*Costs.*) Where, in a feigned issue directed under the Interpleader Act, the plaintiff claimed 182*l.* and recovered only 50*l.*, and a judge at chambers, in the exercise of the discretion given him by the statute, directed each party to pay his own costs, the Court refused to grant a rule to set aside the order.—*Carr v. Edwards*, 8 D. P. C. 29.

JURY.

A new panel of seventy-two jurors may be ordered by the judge to be summoned

during the assizes, and a conviction for felony by a jury selected therefrom, after challenging through forty-eight, is valid.—*Reg. v. Cropper*, 2 Moo. C. C. 18.

LANDLORD AND TENANT.

1. (*Evidence of tenancy to mortgagee.*) The plaintiff was in possession of land under a lease granted to him by one W. B., who had previously mortgaged the premises. The transferees of the mortgage (being cognizant of the lease) gave the plaintiff notice of the mortgage, and required him to pay them all rent due and to become due in respect of the mortgaged premises: Held, that this was evidence whence the jury might infer a contract of tenancy for a year as between the mortgagees and the plaintiff. (9 B. & C. 245; 4 Ad. & E. 299; 9 Ad. & E. 342; 6 Ad. & E. 695.) Held, also, that the omission of the judge to leave it to the jury to say whether or not the plaintiff assented to this new contract of tenancy, the fact not being disputed at the trial, did not amount to misdirection.—*Brown v. Storey*, 1 Scott's N. R. 9.
2. (*Disclaimer.*) The defendant held premises as tenant to one H., with an agreement for "a lease for seven years, or for the lease for lives under which H. held the property." The attorney for the lessors of the plaintiff (who were assignees of H.'s interest in the premises), under an impression that the seven years had expired, went to demand possession, when the defendant said—"I hold a lease on lives, and as long as they live I will not give up possession: you know I have an agreement." The attorney then demanded a quarter's rent, which was due, but the defendant refused to pay it, saying—"I hold under H., and I was directed by him to pay to K. (the superior landlord) and I'll do so: how do I know he may not come and make a demand on me?" Held, that this did not amount to a disclaimer of the title of the lessors of the plaintiff.—*Doe d. Williams v. Cooper*, 1 Scott's N. R. 36.

LARCENY.

1. (*By bailee or servant.*) A person hired to drive cattle to a particular place, who sells the same and absconds with the money, is guilty of stealing, though the intention to sell be not conceived till after taking possession of the cattle.—*Reg. v. Jackson*, 2 Moo. C. C. 32.
2. (*By servant—of cheque.*) It is larceny in the servant of the drawer of a cheque on bankers, to whom it is given to deliver to a third person, to appropriate the value to his own use; and the charge may be of stealing a valuable security, to wit, a cheque of the value specified, without stating the drawees to be bankers.—*Reg. v. Heath*, 1 Moo. C. C. 33.

LEASE.

- (*Lease or agreement.*) By a memorandum of agreement, the plaintiff agreed to let to the defendant, and the defendant agreed to take, a house, &c., from the 24th June then next ensuing, for the term of twenty-one years, determinable at seven and fourteen years: that the lease to be granted by the plaintiff was to contain a covenant on her part for the defendant to purchase the fee simple for 600*l.* at any time within the first seven years of the said term to be granted; and a covenant on the part of the defendant for payment of the rent of 35*l.*, payable quarterly, clear of all deductions for taxes whatsoever; and that the insurance on the sum of 500*l.* was to be paid by the plaintiff, and to be repaid by the defendant as an increased rent: to lay out within twelve months the sum of 100*l.* on the said premises; to keep the premises in substantial repair; and all other usual covenants as in leases of houses in B.; and that the defendant should execute a

counterpart of lease when tendered to him by the solicitor of the plaintiff, and that the expense of the lease and counterpart was to be borne and paid by the defendant. Held, that this was an agreement for a lease, and not an actual demise, and that the defendant, having entered and paid rent under the agreement, became tenant from year to year, which tenancy could only be determined by a regular notice to quit, or a surrender in writing.—*Chapman v. Towner*, 6 M. & W. 100.

LIBEL.

(*Province of judge and jury in actions for libel.*) In an action for libel, the judge is not bound to state to the jury, as matter of law, whether the publication complained of be a libel or not; but the proper course is for him to define what is a libel in point of law, and to leave it to the jury to say whether the publication in question falls within that definition; and, as incidental to that, whether it is calculated to injure the character of the plaintiff.

A publication may be a libel on a private person, which would not be any libel on a person in a public capacity; but any imputation of unjust or corrupt motives is equally libellous in either case.—*Parmiter v. Coupland*, 6 M. & W. 105.

LICENSE.

(*When revocable.*) Where the plaintiff, on the 28th October, sold a rick of hay on his land, with the condition that it might remain there, and be carried away from time to time by the purchaser up to Lady-day next: Held, that this license could not be revoked. (7 Taunt. 374.)—*Wood v. Manley*, 3 P. & D. 5.

LIMITATIONS, STATUTE OF.

(*Appropriation of payments—Acknowledgment.*) An attorney having several demands against his client, some of which were barred by the Statute of Limitations, and others not, claimed a right to appropriate in satisfaction of the earlier items, a sum received on the client's account for damages recovered in an action: Held, that he had no right to do so.

The defendant had a claim against the plaintiff (his attorney), the amount of which was unascertained. At the foot of his bill, the plaintiff acknowledged the debt thus:—"By Mr. Lacy's bill —," leaving a blank for the sum. Held, that this was a sufficient acknowledgment to take the case out of the Statute of Limitations, and that the amount might be supplied by parol evidence. (1 C. & M. 623; 3 Bing. N. C. 883.)—*Waller v. Lacy*, 1 Scott's N. R. 186.

MALICIOUS TRESPASS ACT.

A party may be convicted, under the general clause, s. 24, in the stat. 7 & 8 Geo. 4, c. 30, of having wilfully and maliciously damaged growing wood, to the value of 6d., although s. 20 expressly imposes a penalty for unlawfully and maliciously damaging such wood, "the injury done being to the amount of 1s. at the least."

The proviso of s. 24, exempting from the penalty thereby imposed any person acting under a reasonable supposition of right, does not oblige justices to dismiss a charge made under that section, upon the mere statement of the accused party that he so acted; but in default of proof by him, they may judge, from all the circumstances, whether or not the party did so act.

And it is no proof of a bonâ fide claim subsisting, that several parties, other than the individual charged, have committed similar trespasses, using the same colour of right as that which he professes to rely upon, and that the complainants have obtained injunctions from the Court of Chancery against such parties.—*Reg. v. Dodson*, 9 Ad. & E. 704.

MANDAMUS.

1. (*Return, when sufficient.*) Mandamus to the lord and steward of a manor to hear a plaint. Return, that in 1835 the plaint was set aside and annulled for certain errors (stated in the return), that afterwards, in 1838, in obedience to the writ, the defendants heard the plaint again, when, for the same errors, and others (stated in the return), it was adjudged that the plaint had been rightly set aside in 1835, and that they could not take further cognizance of the plaint: that therefore they could not proceed in the plaint, as by the writ they were commanded. Held, first, that the return was not contradictory, on the ground that it stated both that the plaint had been proceeded with in obedience to the writ, and that it could not be so proceeded with; second, that the return showed that judgment had been given, and that this Court could not review it.—*Reg. v. Lord of the Manor of Old Hall*, 2 P. & D. 515.
2. A rule obtained by the conservators of the Bedford Level for a mandamus to parties liable *ratione tenuræ* to repair the banks of the Ouse, was discharged on a preliminary objection, that by 15 Car. 2, c. 17, the applicants were commissioners of sewers, and therefore might put in force against the parties another remedy.—*Reg. v. Gamble*, 3 P. & D. 122.
3. The Court will not award a peremptory mandamus, until judgment has been obtained on the original mandamus.—*Reg. v. Baldwin*, 3 P. & D. 124.
4. One writ of mandamus cannot issue at the instance of two persons, for the enforcement of separate claims, though they have been successors in the same office, in respect of which the claims arise.—*Ex parte Scott*, 8 D. P. C. 328.

MANOR.

(*Calculation of fines payable by trustees.*) An estate was granted by the lord of a manor to fourteen charity trustees; and by a decree in Chancery, whenever nine lives should drop, new trustees were to be successively appointed by the lord, subject to the approbation of a master in Chancery, on payment of a reasonable fine to the lord. The lord claimed double the admitted yearly value on the first life, half that sum on the second life, half of the latter amount on the third, and so on, in a descending series. Held, that a fine calculated on this principle was a reasonable fine, and that it was not competent to the defendant to show that it would be unreasonable, from the lord's privilege of naming the lives, and the probability, for that reason, and on account of the necessity that charity trustees should be persons of mature age, that the lives would fall more frequently than if they were nominated by the trustees.—*Wilson v. Hoare*, 2 P. & D. 659.

MARRIAGE ACT.

The superintendent registrar has no power to grant his certificate, pursuant to 6 & 7 Will. 4, c. 85, s. 7, where it is proposed that the marriage shall take place out of his district.—*Ex parte Brady*, 8 D. P. C. 332.

MESNE PROFITS.

(*Pleading judgments in ejectment by way of estoppel.*) In trespass for mesne process, by John Doe, the declaration (of 1837) laid an expulsion on the 10th July, 1826, continued to the commencement of the action. The defendant pleaded, 1st, a denial of plaintiff's possession: 2d, lib. ten. Replication to each plea, by way of estoppel, that ejectment had been brought for the same premises on two demises to the plaintiff, one of the 10th July, 1826, for fourteen years, the other of the 26th December, 1831, for seven years, with a single ouster on the 27th December, 1831, and that the plaintiff had judgment to recover his terms. Rejoinder, that a writ of error was pending on such judgment: Held,

1st, that the judgment as set out in the replication estopped the defendant from pleading the above pleas; and 2d, that its effects was not avoided by the rejoinder. (2 Richardson's Pr. of C. P. 440; Brownl. Ent. 493; 1 Salk. 276; 4 B. & Ad. 336; 3 T. R. 188.)—*Doe v. Wright*, 2 P. & D. 672.

MONEY HAD AND RECEIVED.

1. One of two partners, after the dissolution of the partnership, received from an insurance office (under a policy effected in his own name) the value of goods belonging to the plaintiff, which had been deposited with the firm for the purpose of manufacture, and destroyed by fire: Held, that the sum so obtained was not money had and received by the two partners to the plaintiff's use.—*Armitage v. Winterbottom*, 1 Scott's N. R. 23.
2. By the deed of consecration of a chapel, built by subscription, of which the plaintiff was one of the founders, the chapelwardens for the time being were to receive the pew-rents, the surplus of which, after payment of certain expences, was to go towards the re-payment of the expence of building the chapel. S. and G., the chapelwardens for 1838, at the close of their year of office, had in their hands a surplus of 22*l.*, payable to the plaintiff as one of the founders. The plaintiff and defendant were the succeeding chapelwardens. G. handed over the money to the defendant, together with his accounts, with a direction not to pay it over to the plaintiff until the determination of an action against the plaintiff by another of the founders, to recover back money advanced towards the plaintiff's share of the expences of building the chapel: Held, that the plaintiff could not sue the defendant for the amount, as money had and received to his use, before the determination of that cause.—*Sewell v. Raby*, 6 M. & W. 22.

MUNICIPAL CORPORATION ACTS.

1. (*Costs of quo warranto against alderman—Borough fund—Certiorari.*) The costs of defending quo warranto informations against an alderman of a borough, and of prosecuting a criminal information for insulting a borough justice, cannot be paid out of the borough fund.

The statute 7 Will. 4 & 1 Vict. c. 78, s. 44, which grants a certiorari to remove any order for the payment of money out of the borough fund, is retrospective.

The town council may apply for a certiorari to remove an order of a previous council.—*The Queen v. The Town Council of Bridgwater*, 2 P. & D. 558.

2. (*Costs of maintenance of prisoners committed from a borough.*) Under the statute 5 & 6 Will. 4, c. 76, s. 114, the treasurer of a county may make an order on the council for a borough, having a separate court of quarter sessions, for the costs arising out of the punishment and maintenance of offenders committed for trial to the county assizes from the borough: Held, that this clause applied to prisoners committed in the first instance to the borough gaol before trial, and after trial at the assizes, committed to the county prison in execution of their sentences; and that the council was liable, although there was no contract in force, under the 5 Geo. 4, c. 85, between the county and borough justices, for the maintenance of such prisoners: Held, also, that the council was liable, not only for the expenses of the food, clothing, and punishment of such prisoners, but for a proportionate share of the general expenses of the county gaol.—*Reg. v. Johnson*, 2 P. & D. 610.
- 3 (*Compensation.*) Under 5 & 6 Will. 4, c. 76, s. 66, a party claimed compen-

sation as common attorney and treasurer of a borough, and delivered a statement containing the yearly *average* of his salary from "the appointment." The council took no notice of his claim for more than six months. In answer to a rule for a mandamus to execute the usual compensation bond, it was contended that the statement was a nullity, as it did not give the salary "in every year" for the five years, or distinguish the receipts of the two offices. It was also stated, on affidavit, that there was no such borough office as treasurer; that there were two common attorneys in the borough, but neither of them appointed by the corporate body, that they were jointly interested in the profits of the office, and that the other common attorney had not joined in the claim: Held, notwithstanding, that the case was within the proviso in the section, viz. that a claim for compensation shall be considered as admitted, unless the council determine upon it within six months after delivery of the statement, and the rule was made absolute.—*Reg. v. Mayor, &c. of Swansea*, 3 P. & D. 16.

4. (*Same.*) A person removed, under the 5 & 6 Will. 4, c. 76, from the office of clerk to the magistrates of a borough, who has been recognized and paid by the corporation, is entitled to compensation under sect. 66, although there is no such office mentioned in the borough charter. (6 Ad. & E. 339; 3 N. & P. 159.)—*Reg. v. Mayor, &c. of Carmarthen*, 3 P. & D. 35.
5. (*Appeal against borough rate.*) The 7 Will. 4 & 1 Vict. c. 81, s. 2, authorized a borough rate to meet certain expenses not levied under 5 & 6 Will. 4, c. 76, s. 92, and provided that "every such rate shall be made, levied, and recovered in the manner provided by the said act for regulating corporations, and by this act." No appeal lies against such rate.—*Reg. v. Recorder of Ipswich*, 8 D. P. C. 103.

MURDER.

1. (*Of child—Name.*) In an indictment for child murder, the child must be named, or stated to be of name unknown, or otherwise accounted for. It is not enough to describe the child as not baptised.—*Reg. v. Biss*, 2 Moo. C. C. 93.
2. (*By poison, proof of.*) An indictment for the murder of A. B. by poison, stating that the prisoner gave and administered a certain deadly poison, is supported by proof that the prisoner gave the poison to C. D. to administer as a medicine to A. B., but C. D. neglected to do so, it was accidentally given to A. B. by a child; the prisoner's intention throughout being to murder.—*Reg. v. Michael*, 2 Moody, C. C. 120.

NOTICE OF ACTION.

1. (*Under Malicious Trespass Act.*) Where the plaintiff, under a claim of right, had taken forcible possession of premises, and committed several outrageous acts, and the attorney of the owner of the premises having been sent for, on the following day gave the plaintiff, whom he found still on the premises, in charge under the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30: Held, that although not justified in so doing, he was entitled to notice of action. (9 B. & C. 806; 1 M. & W. 628.)

To entitle a defendant to notice of action under that act, he must both have acted with bona fides, and have had probable cause for believing that he was acting under the statute.—*Cann v. Clipperton*, 2 P. & D. 562.

2. (*To justice, computation of.*) In the computation of the calendar month's notice

of action to a justice, required by the 24 Geo. 2, c. 44, s. 1, the day of giving the notice, and the day of suing out the writ, are both to be excluded. (*Overruling Castle v. Burditt*, 3 T. R. 623; 15 Ves. 248; 4 B. & Ald. 522; 9 R. & Cr. 134, 603; 3 M. & W. 473.)—*Young v. Higgm*, 6 M. & W. 49; 8 D. P. C. 212.

ORDER OF REMOVAL.

1. (*Examination of pauper.*) The examination of a pauper sent to the appellant parish with an order for his removal, stated that he was bound apprentice by the overseers of the respondent parish to a master in the appellant parish, and that he there duly served his apprenticeship. The grounds of appeal were stated to be that the pauper was born in the respondent parish, and had never done any act whereby to gain a settlement in the appellant parish, inasmuch as the requisites of 56 Geo. 3, c. 139, and more particularly the fifth section of that act, were not complied with when the pauper was so bound apprentice: Held, upon this statement of the grounds of appeal, that the appellants were not entitled to show at the trial that their overseers had no such notice of the binding as is required by section 2. of that act.—*Reg. v. Inhabitants of Whitley Upper*, 3 P. & D. 81.
2. (*Appeal—Notice of grounds of appeal.*) Where an appeal against an order of removal has been heard, and in consequence of the justices being equally divided, is adjourned to a subsequent sessions for another hearing, the appellants cannot serve another statement containing new grounds of appeal.—*Reg. v. Inhabitants of Arlecdon*, 3 P. & D. 93.

OVERSEERS.

- (*Examination of accounts of.*) By the 50 Geo. 3, c. 69, s. 1, it is enacted, that churchwardens and overseers shall, within fourteen days after other overseers shall be nominated to succeed them, deliver on oath before two justices an account in writing of all sums received, &c. by them during their year of office: and such justices are authorized and empowered, if they shall think fit, to examine into the matter of such accounts, and to disallow unfounded and reduce exorbitant items: Held, that these words rendered it imperative on the justices to examine, and, if necessary, disallow or reduce the accounts, when objections were made to any part of them by any rated inhabitant at the special sessions, and that they were liable to a mandamus if they omitted to do so.—*Reg. v. Justices of Cambridge*, 8 D. P. C. 89.

PARTICULARS OF DEMAND.

The declaration charged the defendant with *not taking due care of*, and with *not returning*, certain goods. The particulars claimed damages only for the *non return* of the goods: Held, that the plaintiff could not go into evidence of damage done to the goods, though extending to their total destruction.—*Moss v. Smith*, 1 Scott's N. R. 25.

PARTNERSHIP.

1. (*Liability of, to third parties.*) Where an agreement is entered into for a partnership to commence on a given day, the fact that the partnership deed is not executed till a subsequent day, will not affect the liability of the members of the firm in respect of contracts entered into with third persons. (10 B. & Cr. 288.)—*Battley v. Bailey*, 1 Scott's N. R. 143.
2. (*What agreement constitutes.*) The plaintiff and defendant, together with others,

entered into and signed the following special contract: "Being desirous that the communication between London, Herne Bay, and Margate, should be kept open during the ensuing winter, by means of a small steam-boat, we hereby authorize Mr. G. A. B. to charter the Brockelbank, or any other suitable vessel, for that purpose, on the best possible terms, and to make the necessary arrangements for her running on the station during the whole or such part of the winter as may be deemed expedient, on our joint account, each of us taking a proportionate interest in this enterprize, according to the amount subscribed, and the profit or loss to be divided amongst us in proportion to our subscription. In order to form a fund for defraying the necessary expenses, we have each of us paid 10*l.* per cent. on the amount of our subscriptions, and we hereby bind ourselves, and agree to pay to Mr. G. A. B. such further instalments, each of us in proportion to his subscription, as it may be necessary to call for from time to time, should the earnings of the boat not be sufficient to pay the expenses. It being, however, understood that our liability is not to extend beyond the amount subscribed by us respectively:"—Held, that this agreement constituted a partnership between the parties who signed it; and that the plaintiff, who had paid such debts arising from the undertaking as the earnings of the boat were insufficient to satisfy, could not maintain an action for money paid, against the defendant who had not paid up his subscription, but that the proper form of action was a special action of assumpsit for the non-performance of the undertaking to pay the plaintiff the instalments from time to time.—*Brown v. Tapscott*, 6 M. & W. 119.

PAUPER.

(*Costs.*) The Court will, under the rule of H. T. 2 Will. 4, s. 110, make absolute a rule requiring a pauper plaintiff to pay the costs of the day for not proceeding to trial. (2 D. P. C. 468.)—*Gore v. Morphew*, 8 D. P. C. 137.

PAYMENT.

(*Particulars of.*) The Court will not compel a defendant to deliver particulars of a plea of payment.—*Phipps v. Sothorn*, 8 D. P. C. 208.

PERJURY.

1. (*Competency of witnesses on indictment for.*) On an indictment for perjury committed by a bankrupt in support of his petition to the Court of Review, to supersede his bankruptcy, the petitioning creditor, the assignees, and creditors are competent witnesses to prove the validity of the commission.—*Reg. v. Keat*, 2 Moo. C. C. 24.
2. (*Indictment.*) An indictment for perjury, stating that the prisoner came before a magistrate and falsely, maliciously deposed, swore, charged and gave him to be informed, that C. F. E. had a venereal affair with a donkey, shows sufficiently a proceeding before a magistrate to make the false swearing perjury.—*Reg. v. Gardiner*, 2 Moo. C. C. 95.

PLEADING.

1. (*Plea of nil debet—General issue by statute.*) A plea of nil debet, to an action of debt for goods sold, money had and received, and on an account stated, is bad, although as regards the count for money had and received the plea may be pleadable by statute.

Where a statute gives the plea of the general issue for any thing done in pursuance of the act, the plaintiff cannot oust the defendant of this plea by waiving the tort and suing in contract.—*Calvert v. Moggs*, 2 P. & D. 543.

2. (*Money paid.*) To indebitatus assumpsit for money paid, the defendant pleaded, that the money was paid by the plaintiff as the defendant's agent in the purchase of shares in a company; that after the payment the plaintiff received certificates of title to the shares, and ought to have delivered the same to the defendant, but that instead thereof the plaintiff converted the certificates to his own use, and prevented the defendant from disposing of the shares, which were consequently of no use to the defendant: Held bad on special demurrer, as it admitted the plaintiff's right of action to be complete, and set up, by way of confession and avoidance, that which was only a ground of cross action.—*Francis v. Baker*, 2 P. & D. 569.
3. (*Several pleas.*) Where a judge has made an order that certain pleas may be pleaded, his order must be rescinded before a rule can be granted to strike out such pleas. The Court discharged as irregular a rule for striking out pleas, as it had not been drawn up on reading the declaration or making it an exhibit.—*South-Eastern Railway Company v. Sprot*, 3 P. & D. 110.
4. (*Evidence under not guilty, in case.*) In an action on the case, for maliciously and without probable cause refusing to accept debt and costs from a prisoner, evidence of probable cause may be given under the plea of not guilty. (3 Ad. & E. 312.)—*Houndsfield v. Drury*, 3 P. & D. 127.
5. (*Issuable plea, what is.*) The plaintiff sued under letters of administration granted by the Archbishop of Dublin. The defendant, who was under terms to plead issuably, pleaded that the intestate, at the time of his death, was an inhabitant of and commorant within the city of Dublin, and had bona notabilia within the diocese of the Bishop of London: Held, that this was not an issuable plea.—*Huthwaite v. Phaire*, 1 Scott's N. R. 43.
6. (*Several pleas—Payment into court.*) In trespass for breaking and entering the plaintiff's house and seizing his goods, the Court refused to allow the defendant to plead payment into Court in bar of the further maintenance of the action generally, together with not guilty, and several other pleas to part of the cause of action: but put him to his election to withdraw it, or to limit it to part of the cause of action.—*Thompson v. Jackson*, 1 Scott's N. R. 157.
7. (*Plea of payment into Court, what admitted by.*) A plea of payment into Court, by two defendants, pleaded to one or more indebitatus counts, admits only that the plaintiff has a cause of action on one or more of the contracts declared on, to the amount of the sum paid in; and does not admit the defendants' joint liability to any greater amount, although the plaintiff gives evidence aliunde to fix one of the defendants with liability to a greater amount. (5 M. & W. 94.)—*Stapleton v. Nowell*, 6 M. & W. 9; 8 D. P. C. 196.
8. (*Plea of payment, how construed, where credit given in particulars.*) Where a plaintiff gives credit in his particulars of demand for payments, whether made before or after action brought, and goes only for the balance, a plea of payment is to be taken as pleaded to such balance; and if the defendant proves payments to that amount, independently of the sums credited in the particulars, he is entitled to a verdict.—*Eastwick v. Harman*, 6 M. & W. 13.
9. (*Dating pleadings—Similiter.*) *Semble*, that where a party adds the similiter, forming part of his own pleadings, it is a pleading within R. H. T., 4 Will. 4, s. 1, and must bear a date, or it may be set aside for irregularity. Such irregularity is not waived by the party to whom the issue so made up is delivered

omitting to take that objection, on attending a summons to show cause why the action should not be tried before the sheriff. (3 M. & W. 409.)—*Middleton v. Woods*, 6 M. & W. 136; *S. C. nomine Middleton v. Hughes*, 8 D. P. C. 170.

10. (*Several pleas.*) In trespass quare clausum fregit, the defendant pleaded, 1st, not guilty; 2dly, that the plaintiff was not possessed; 3dly, that defendant was seised in fee; 4thly, that A. B. was seised in fee, and that the defendant, by his command, committed the trespass complained of, &c. A summons having been taken out to strike out the 3d and 4th pleas, the judge refused to make any order, whereupon an application for that purpose was made to this Court: Held, that the 3d and 4th pleas might be pleaded together with the 2d, as they were not necessarily founded on the same ground of answer or defence, within R. G. H. T. 4 Will. 4, s. 6.

Quære, whether such an appeal lies to the Court, where the judge at chambers has refused to make any order.—*Morse v. Apperley*, 6 M. & W. 145; 8 D. P. C. 203.

11. (*Amendment of declaration—Issuable plea—Demurrer.*) If a plaintiff amends his declaration after a defendant has obtained time to plead on the usual terms issuably, &c., the defendant is at liberty to demur specially to the declaration. (5 D. P. C. 134; 6 D. P. C. 371.)—*Children v. Mannering*, 8 D. P. C. 120.
12. (*Frivolous plea.*) Declaration by indorsee on a bill drawn by defendant on C., indorsed by defendant to G., by G. to D., and by D. to plaintiff. Plea, that defendant drew the bill and indorsed it to C., for the accommodation of C. and without consideration, and that there was no consideration for indorsement by C. to the plaintiff, and that the plaintiff holds it without consideration, the Court set aside the plea as frivolous.—*Emanuel v. Randall*, 8 D. P. C. 238.
13. (*Duplicity.*) A declaration stated that the defendant made his bill of exchange and directed it to D., and that it was afterwards indorsed to plaintiff; that the bill was protested for non-acceptance and also for non-payment, &c.: and whereas also the defendant was indebted to plaintiff on an account stated, and defendant, in consideration of the premises respectively, promised the plaintiff to pay him the said monies respectively on request: Held, on special demurrer for duplicity and uncertainty, that whether the former part of the declaration were considered as two counts or one only, it was not demurrable on either of those grounds. (2 Saund. 121.)—*Galway v. Rose*, 8 D. P. C. 239.
14. (*Payment into Court.*) To a count on a bill of exchange or promissory note, a defendant cannot pay into court a smaller sum, and plead that he never was indebted to a larger amount; but should show a failure of consideration or some other valid defence as to part, and then pay the residue into Court.—*Armfield v. Burgin*, 8 D. P. C. 247.
15. (*Frivolous demurrer.*) The Court refused to set aside as frivolous, a demurrer to a declaration on a bill of exchange by indorsee against acceptor, on the ground of its not stating to whose order the bill was drawn.—*Hart v. Proudfoot*, 8 D. P. C. 306.
16. (*Issuable plea.*) If a defendant, under terms to plead issuably, plead nunquam indebitatus to a declaration containing counts on bills of exchange, as well as money counts, the plaintiff may treat the plea as a nullity, and sign judgment.—*Sewell v. Dule*, 8 D. P. C. 309.
17. (*Title of demurrer.*) A demurrer omitting the words "in the year of our Lord" in the date, is irregular.—*Holland v. Tealdi*, 8 D. P. C. 320.

18. (*Replication de injuria.*) An action by second indorsee against acceptor of bill of exchange, the defendant pleaded, 1st, that he accepted the bill for the accommodation of B., who delivered it to the plaintiff, upon an agreement to discount the same; 2nd, that after the bill was indorsed to the plaintiff, and before the commencement of the suit, the plaintiff indorsed the bill to a person unknown, and the defendant then became and still is liable to pay the amount of the bill to the said person to whom it was indorsed, and who from the time of the indorsement hitherto hath been, and still is the owner thereof. Replication to first plea, *de injuria*; to the second plea, that at the time of the commencement of the suit, the plaintiff was and still is the holder of the bill, without this, that any other person is the holder thereof, *modo et formâ*: Held, that *de injuria* was a good replication to the first plea, and that the replication to the last plea was bad on special demurrer.—*Basan v. Arnold*, 8 D. P. C. 357.
19. (*Payment credited in particulars.*) In an action for work and labour, &c. the particulars stated the action to be brought to recover 77*l.* 4*s.* 11*d.*, the full particulars exceed three folios, and have been already delivered. The former particulars were delivered before action brought, and claimed 77*l.* the balance of 123*l.*, and acknowledged receipts by cash for 46*l.*: Held, that this admission was not within the rule T. T. 1 Vict. and that payment of the 46*l.* should have been pleaded.—*Bosley v. Moore*, 8 D. P. C. 375.

POOR LAWS AMENDMENT ACT.

(*Order of commissioners to appoint new officers.*) An order of the Poor Law Commissioners, under 4 & 5 Will. 4, c. 76, directing the guardians of a union, under Gilbert's Act, for there had always been a visitor and treasurer, to appoint an auditor to audit the accounts and to disallow payments not authorized by law, and a clerk to attend meetings of guardians, keep minutes of the proceedings, conduct their correspondence, &c. and also prepare such statistical information as he should deem important to the public service, was held to be vitiated by the last mentioned direction, this being a matter too remotely connected with the relief of the poor, but held that the order for the appointment of the new officers would have been valid, in other respects, because the powers of the visitor and treasurer under Gilbert's Act are insufficient for carrying into effect the provisions of 4 & 5 Will. 4, c. 76.—*Reg. v. Poor Law Commissioners, in re Alstonefield Incorporation*, 3 P. & D. 59.

POOR RATE.

(*Rateability of public buildings.*)—By a local act certain buildings were vested in the justices of the county of Worcester, upon trust to permit and suffer all the courts of assize, sessions, and others, to be holden there, and also to permit the said courts, and the lodgings provided for the judges of assizes, to be used and enjoyed for the purposes for which the same might be designed. The building was supported by the county at large and the justices were authorized to let the building when not used for county purposes. A quantity of plate and wine, the former paid for by the county, the latter by subscription, &c. amongst the magistrates, was kept in that part of the building used as the judges' lodgings during the assizes, and the plate was used by the judges, and by the magistrates at sessions; the wine was used by the latter exclusively. There were also sleeping rooms at this building which were used by the magistrates during the session: Held, that as the buildings were vested in the justices at large for public purposes only, a beneficial occupation of them by certain of the number did not make the whole rateable.—*Reg. v. Justices of Worcestershire*, 3 P. & D. 8.

2. The 6 & 7 Will. 4, c. 96. s. 2, enacts, that every poor-rate shall contain an account of every particular set forth at the head of the respective columns in the form given by the schedule to that act, and that the churchwardens and overseers shall, before the rate is allowed by the justices, sign the declaration given at the foot of the said form, "and otherwise the said rate shall be of no force or validity:" Held, that the words "of no force, &c." applied solely to default in signing the said declaration, and that as default in following the form given in the column had not been made a ground of appeal by the statute, the sessions had no power to quash a rate for such default. On the argument of a case from the sessions it is too late to object that the order brought up varies from the order required by the certiorari. A concurrent rate made for the same period as a former subsisting rate is legal.—*Reg. v. Inhabitants of Fordham*, 3 P. & D. 95.
3. (*Distress for invalid poor-rate.*) In replevin the defendant made avowry under a distress warrant for poor-rate. The warrant was to levy a gross sum made up of several rates, some of which had not been published on the Sunday after allowance, but the plaintiff had not appealed against them: Held, however, that as the rates of which due notice had not been given were invalid, the distress was illegal.—*Sibbald v. Roderick*, 3 P. & D. 106.

PRACTICE.

1. (*Judgment as in case of nonsuit.*) Where a rule for judgment as in case of a nonsuit is discharged on a peremptory undertaking, and the plaintiff omits to draw up the rule, the defendant is bound to draw it up and serve it within the proper time, before he can avail himself of it.—*Gingell v. Bean*, 1 Scott's N. R. 153.
2. (*Service of notice of trial.*) Service of a notice of trial, by leaving it with a laundress having the care of the several offices in a house, is not good.—*Brown v. Wildbore*, 1 Scott's N. R. 159.
3. (*Judgment as in case of nonsuit.*) Issue was joined, in a town cause, in Michaelmas vacation: Held, that a motion for judgment as in case of a nonsuit, in Easter term, was too early. (2 M. & W. 363; 5 D. P. C. 526; 6 D. P. C. 507.)—*Duggan v. Wilbraham*, 1 Scott's N. R. 212; see *Doe d. Balls v. Margrave*, ib. 213.
4. (*Affidavit to set aside interlocutory judgment.*) An affidavit in support of a rule to set aside an interlocutory judgment must state in express terms that judgment has been signed: and it was held not to be sufficient to state that a rule to compute had been served on the defendant.—*Classey v. Drayton*, 6 M. & W. 17; 8 D. P. C. 184.
5. (*Staying execution till trial of second action on same subject.*) In an action by the owners of goods which were on board a vessel, and were lost by a collision with the defendant's vessel, the jury having found a verdict for the defendants, the plaintiff in another action against the same defendants for the same injury, which stood next in the paper for trial, withdrew the record. The Court refused on the application of the plaintiffs in the first action, to stay the judgment and execution until after the trial of the second, although it was stated on affidavit that material evidence in favour of the plaintiffs, which could not be produced on the former trial, would be adduced on the other: the judge being satisfied with the verdict.—*Yates v. Dublin Steam Packet Company*, 6 M. & W. 77.
6. (*Deposits in lieu of bail, taking out of Court.*) Where a defendant, on being

held to bail under a judge's order, deposits with the sheriff the amount indorsed on the writ, and 10*l.* for costs, under the 43 Geo. 3, c. 46, s. 2, and afterwards allows those sums, with an additional 10*l.*, to be paid into Court, the plaintiff is not entitled to have the two former sums paid out to him.—*Scherwinski v. Peronet*, 6 M. & W. 90; 8 D. P. C. 229.

7. (*Service of judge's order.*) A party obtaining a judge's order ought to serve it "forthwith," i. e. before the opposite party can take the next step. And where a party, at 5 o'clock on the day before the time for joining in demurrer expired, obtained an order for three days' time to join in demurrer, which was not served until 2 o'clock on the following day, and the plaintiff had signed judgment at the opening of the office at 11 o'clock on the same morning: Held, that the order had been served too late.—*Kenney v. Hutchinson*, 6 M. & W. 134; 8 D. P. C. 171.
8. (*Demand of plea.*) In an action by indorsee against indorser of a bill of exchange, the defendant having suggested that the indorsement was a forgery, the plaintiff, to afford time for inquiry, gave an undertaking that he would not sign judgment without four days' demand of plea. The defendant, on the 9th of November, delivered a double plea, and ruled the plaintiff to reply. On the 11th the plaintiff signed judgment: Held regular.—*Booth v. Whitehead*, 8 D. P. C. 8.
9. (*Discharging summons for particulars.*) A summons having been taken out at chambers for further and better particulars of the defendant's plea of set-off, the judge's decision was postponed, after the first hearing, in order that the defendant might produce an affidavit. The defendant, having failed to procure the affidavit, applied to the Court for a rule to discharge the summons, and calling on the plaintiff to show cause why the particulars delivered should not be deemed sufficient: Held, that such application could not succeed while the summons was pending.—*Abbott v. Harris*, 8 D. P. C. 19.
10. (*Service of rules.*) Service of a rule to compute at the Herald's Office, the defendant being a herald and going to the office for a short time two or three days a week, will not do.—*Grover v. Fitzroy*, 8 D. P. C. 29.
11. (*Same.*) The Court refused to make absolute a rule to compute, upon service at the defendant's house, and by sticking up a copy in the master's office, the defendant having quitted England on a voyage, it being no part of the rule nisi that such service should be deemed sufficient.—*Neilson v. Shee*, 8 D. P. C. 32.
12. (*Rule to compute.*) The irregularity of the judgment cannot be shown for cause to a rule nisi to compute principal and interest on a bill of exchange.—*Keily v. Villebois*, 8 D. P. C. 136.
13. (*Dating rule.*) Where a rule is applied for on one day, but, from the Court taking time to consider, is not granted until a subsequent day, it should be dated as of the former day.—*Egan v. Rowley*, 8 D. P. C. 145.
14. (*Stamp on judge's order.*) The Court will not judicially notice the stamp on a copy of a judge's order, it not being the seal of the Court, but merely the mark of the judge's clerk.—*Barrett Navigation v. Shower*, 8 D. P. C. 173.
15. (*Notice of taxation.*) A notice to attend taxation at *Westminster*, during term, is good.—*Blake v. Warren*, 8 D. P. C. 173.
16. (*Staying proceedings.*) A judge at chambers has no power, before declaration, without consent, to order that the proceedings be stayed on payment of debt

- and costs within a certain time, otherwise judgment for the plaintiff.—*Reynolds v. Sherwood*, 8 D. P. C. 183.
17. (*Motion for a new trial, time for.*) A motion for a new trial may be made at any time within four days after the *distringas juratorum* is returnable, though more than four days have elapsed since the trial.—*Aymes v. Lettice*, 8 D. P. C. 202.
18. (*Judgment as in case of nonsuit.*) Where a plaintiff has given a peremptory undertaking to try at a particular sittings in term, and has allowed them to pass without giving notice of trial, judgment absolute may be obtained in the same term.—*Ashston v. Johnstone*, 8 D. P. C. 299.
19. (*Renewal of motion.*) Where a rule has been discharged on the ground of a defect in the title of the affidavits, the application may be renewed on the same materials.—*Reg. v. Jones*, 8 D. P. C. 307. See *Reg. v. Harland*, *ib.* 323.
20. (*Motion for costs of the day.*) On a motion for costs of the day for not proceeding to trial on two different occasions pursuant to notice, the court will not make the payment of those costs a condition precedent to the plaintiff's trying his cause.—*Shoredicke v. Gilbard*, 8 D. P. C. 296.
21. (*Stay of proceedings by summons.*) If a plaintiff take out a summons to amend the declaration, the defendant has a right to presume it will be followed up by a peremptory summons, and therefore it will operate as a stay of proceedings for one day: consequently, when the time for pleading was out on the day on which the peremptory summons could have been made returnable, judgment signed for want of a plea on the next morning was held irregular.—*Hodgson v. Caley*, 8 D. P. C. 318.
22. (*Effect of order for staying proceedings.*) After commencement of a suit, a judge's order was made by consent, "that upon payment of the costs down, and the debt in six months, all further proceedings in the cause should be stayed, and in default of payment the plaintiff should be at liberty to sign judgment. The costs were paid, and before the expiration of six months the plaintiff obtained an order to hold the defendant to bail under the 1 & 2 Vict. c. 110, s. 3: Held, that the *capias* was a proceeding in the cause, and that, as the previous order amounted to an agreement to give credit for six months, the plaintiff could not hold the defendant to bail before the expiration of that period, without an express stipulation to that effect.—*Ball v. Stanley*, 8 D. P. C. 345.
23. (*Staying proceedings in trover.*) In trover, the court will, on application of the defendant, stay proceedings on delivery of a portion of the goods, and payment of costs and any damage; and in the event of the plaintiff refusing such terms, the court will permit the defendant to deliver up the goods, the plaintiff to pay the costs incurred subsequently to such delivery, in the event of his not recovering in respect of some other articles than those delivered up, or more than nominal damages in respect of those delivered up.—*Peacock v. Nichols*, 8 D. P. C. 367.
24. (*Postponing trial till injunction in equity.*) The court will not postpone the trial of a cause, on the ground that the defendant has filed a bill in equity against the plaintiff, and is advised that an injunction will be granted as soon as the matter can be heard according to the practice of the Court of Equity.—*Vandersteegen and another v. Witham*, 8 D. P. C. 369.

PRESCRIPTIVE ACT.

To a declaration in case for causing offensive stench to come over the plaintiff's land, the defendant pleaded that he occupied premises adjoining those of the plaintiff, and for twenty years next before the commencement of the suit had enjoyed, of right and without interruption, the benefit of using a mixen on his own premises, near to the premises of the plaintiff; that thereby stench necessarily arose; and that, in using the mixen, at the times when, &c., stench necessarily arose, which were the grievances complained of: Held, that the plaintiff was entitled to judgment non obstante veredicto, as the plea did not state that the stench had for twenty years passed over the plaintiff's land.—*Flight v. Thomas*, 2 P. & D. 531.

PRINCIPAL AND AGENT.

(*Liability of principal on sale of stock through broker—Stock jobbing act—Evidence—Bank books.*) Indebitatus assumpsit, in 5,000*l.*, for certain 3*l.* per cent. stock alleged to be sold, and caused to be transferred, by the plaintiff to the defendant, and by the defendant duly accepted. Pleas—1st, non assumpsit; 2nd, that the defendant did not accept the stock from the plaintiff. At the trial it appeared that one T., a stock-broker, had applied to the plaintiff, a stock-jobber, for the purchase of stock to the amount of 5,000*l.* for the defendant. The plaintiff, not having any stock of his own, applied to W., who agreed to transfer, and did accordingly transfer, stock standing in his name to the defendant. Evidence was given that it was the usage on the Stock Exchange to give credit to the broker, even although the principal were disclosed; though credit is sometimes given to the principal, and his cheque taken, where the broker's credit is not thought sufficient: Held, that under these circumstances the learned judge was right in leaving it to the jury to consider, whether the plaintiff sold the stock on the credit of T. and T. only, or on the credit and responsibility of the principal, the defendant; and the jury having found the latter, that the verdict was right:—

Held, also, that although the plaintiff was not in possession of the stock at the time of the sale or transfer, he could maintain indebitatus assumpsit for the price of it: and that the contract was not prohibited by the stat. 7 Geo. 2, c. 8, s. 8, as that only applies to fictitious sales of stock, and not to cases where the stock is actually transferred, although the seller was not possessed of it at the time of the contract.

A witness having been called to prove on the part of the plaintiff, that, immediately after the transfer had taken place, the plaintiff requested T. to give him the cheque of his principal: Held, that this evidence was admissible, not as amounting to an admission, but as part of the *res gestæ*.

In order to prove the acceptance of the stock by the defendant, evidence was adduced that T., and a person unknown to the clerk in the bank, came there with T., and made an entry of his acceptance of the stock, and a witness was then called who proved that he had inspected the bank books, and that the signature to the acceptance of the stock was in the defendant's handwriting: Held, that this evidence was admissible to prove the acceptance of the stock by the defendant, and that it was not necessary that the bank books themselves should be produced, they not being removable on the ground of public convenience.

On the part of the defendant, several letters, containing accounts between the defendant and T., were offered in evidence, to prove the existence of a debt from T. to the defendant to the amount of the stock transferred. Other evidence

had been given which showed that fact on the part of the plaintiff, and the plaintiff's counsel admitted in his reply, that the existence of the debt from T. to the defendant had been sufficiently established. The defence turned on a point collateral to this question. This evidence having been rejected: Held, that rejection of it did not form a sufficient ground for a new trial.

Held, also, that the allegation in the declaration, of the acceptance of stock from the plaintiff, was sufficiently shown, although made through the medium of W.—*Mortimer v. McCallan*, 6 M. & W. 58.

PRISONER.

(*Discharge under 48 Geo. 3, c. 123.*) It is not necessary, on giving notice to move for the discharge of a debtor under the 48 Geo. 3, c. 123, to have a copy of the affidavit made in support of the application.—*Wilcox v. Lemon*, 8 D. P. C. 144.

PROCESS.

1. Service of distringas of lunatic.—*Humphreys v. Griffiths*, 6 M. & W. 90.
2. (*Return of writs in vacation.*) An attachment lies against the sheriff for not returning a writ of venditioni exponas pursuant to a judge's order made in vacation, under the rule of M. T., 3 Will. 4, s. 13, although that writ is not mentioned in the rule. (7 D. P. C. 56.)—*Reg. v. Sheriff of Berkshire*, 8 D. P. C. 98.
3. (*Distringas.*) Where the time for appearance to a writ of summons is out on Friday, a motion to issue a distringas may be made on Monday, on an affidavit sworn on Saturday, stating that no appearance had been entered by the defendant.—*Spence v. Barker*, 8 D. P. C. 296.
4. (*Indorsement on writ of summons.*) Where a firm described themselves, on the back of the writ, as agents for another attorney, stated to be the plaintiff's attorney: Held, to be no objection that one of the firm appeared in the declaration as the attorney.—*Armstrong v. King*, 8 D. P. C. 297.
5. (*Service of writ of summons.*) In an action against a writer to the signet, resident at Edinburgh, as administrator, the Court refused to allow service of the writ on the party resident in London who had acted as agent in obtaining the letters of administration, to be good service.—*Kerr v. Miller*, 8 D. P. C. 322.
6. (*Amendment of writ.*) A writ of ca. sa. issued after the 1 & 2 Vict. c. 110, but before the late form, H. T. 3 Vict., commanded the sheriff to take the defendant to satisfy the plaintiff for the debt, costs, and interest, at the rate of four per cent., and that the sheriff should do all such things as by the 2 Vict. authorized and required: Held, that as the statute gave an additional remedy upon executions, the party might alter the writ accordingly, though no new form had been promulgated by the judges.—*Erdy v. Martin*, 8 D. P. C. 343.
7. (*Service of writ of summons before arrest, under 1 & 2 Vict. c. 100, s. 3.*) Though a writ of summons must be sued out before a capias can be applied for, under 1 & 2 Vict. c. 110, it is not necessary that the defendant should be served with a copy thereof previously to his arrest; but where there has been no service of such writ, the Court will grant a rule to discharge the defendant out of custody, unless he be served within a limited time.—*Brooke v. Snell*, 8 D. P. C. 370.

QUO WARRANTO.

1. (*Staying proceedings under 1 Vict. c. 78.*) Quo warranto information for exercising a borough office, the ground of proceeding being, that the officers presiding at the election were not qualified. The defendant pleaded that he was duly

elected. Pending the information, the stat. 7 Will. 4 and 1 Vict. c. 78, passed. The prosecutor thereupon moved for a stay of proceedings, and payment of costs by the defendant down to the passing of the act, under the 20th section. The Court made the rule absolute, although the defendant suggested that he had a defence independent of the statute (not specifying its nature), and offered to pay all costs of the trial if he failed in establishing such defence.—*Reg. v. Hooker*, 9 Ad. & E. 680.

2. If the relator of a quo warranto information and the defendant employ the same attorney, the Court will make a rule absolute to change the attorney for the prosecution, although there be no collusion between the parties, and the attorney intended to proceed *bonâ fide* to obtain the judgment of the Court.—*Reg. v. Alderson*, 3 P. & D. 2.

RAILWAY ACT.

1. (*Mandamus to complete railway.*) A company empowered by act of parliament to make a railway from London to Norwich and Yarmouth, passing through Colchester, and required thereby to set out any deviations from the parliamentary plan before the 27th July, 1839, and to make their compulsory purchases of land before the 27th July, 1840, had for two or three years proceeded with great activity to complete the line as far as Colchester, but on May 6th, 1839, had not commenced proceedings for carrying on the line below Colchester. This course was approved of by the shareholders at large, and the funds of the company were nearly exhausted; but it appearing doubtful whether the company had any *bonâ fide* intention of completing the entire line, the Court of Queen's Bench, at the instance of a small proportion of the shareholders, and of a few landholders on the line, made absolute a rule for a mandamus to the company to set out their deviations, and make their purchases below Colchester. (1 Myl. & K. 154; 3 B. & Adol. 108; 2 M. & W. 824.)—*Reg. v. Eastern Counties' Railway Company*, 2 P. & D. 648.
2. Under the provisions of a railway act (4 Will. 4, c. cxxv.), a party had called upon the company to issue their warrant to the sheriff to impanel a jury, and assess the damage sustained by him in consequence of certain of his land having been taken for the purposes of the railway. The company however refused to do so, and a rule for a mandamus having been obtained against them, an objection on behalf of the company, on showing cause, that the party had not entered into the bond required by the act, (s. 72), was held too late.—*Reg. v. Northern Union Railway Company*, 8 D. P. C. 329.

RAPE.

1. (*Conviction for assault, under indictment for.*) A boy under fourteen years of age, indicted for a rape, may be acquitted of the felony, and convicted of an assault, under 1 Vict. c. 85, s. 11.—*Reg. v. Brimilow*, 2 Moo. C. C. 122; 9 C. & P. 366.
2. (*Same.*) A prisoner cannot be convicted of an assault with an intent to know, &c. a girl above ten and under twelve years of age, nor of a common assault, if she be consenting. The proper charge is of misdemeanour in attempting to commit a statutable offence.—*Reg. v. Martin*, 2 Moo. C. C. 123; 9 C. & P. 213, 215.

RECEIVING GOODS OBTAINED BY FALSE PRETENCES.

To bring a case of receiving within the 7 & 8 Geo. 4, c. 29, s. 55, the indictment must allege the goods to have been obtained by false pretences, and known

to have been so. It is not enough to allege them to have been "unlawfully obtained, taken, and carried away."—*Reg. v. Wilson*, 2 Moo. C. C. 52.

RECEIVING STOLEN GOODS.

(*Indictment.*) An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that A. B. feloniously incited the said evil-disposed person to commit the said felony, and that C. D. and E. F. feloniously received the said goods knowingly, &c., is bad as against A. B., but good against the receivers, as for a substantive felony.—*Reg. v. Caspar*, 2 Moo. C. C. 101.

RESTRAINT OF TRADE.

The defendant demised to the plaintiff for ten years a brewery and premises at S., "and also the exclusive or such other privilege as the defendant then enjoyed for supplying ale, &c. to the Punch Bowl, and certain other public houses (naming them), which were then the property of the defendant, or were then under his control," the defendant at the time of the demise himself occupied the Punch Bowl, but during the term assigned it to one G. In an action upon the above covenant, the plaintiff assigned as a breach that G. while tenant of the Punch Bowl, did not purchase all the ale, &c. consumed on the premises from the plaintiff, but purchased it from the defendant, and from divers other persons to the plaintiff unknown: Held, that this breach was not well assigned.

Quere, whether the supposed privilege could properly form the subject-matter of a demise, or, if it could, whether it could be implied from the word "demise." The indenture contained a covenant that the defendant "would not, during the continuance of the demise, either by himself, or for, by, or with any person or persons, or for the use or benefit or advantage of any other person or persons whomsoever, exercise or carry on the trade or business of a brewer, or merchant or agent for the sale of ale, &c. in S. or elsewhere, or in any manner howsoever be concerned in the said trade or business:" Held void, as being a general restraint of trade during the term. (5 M. & W. 548.)—*Hinde v. Gray*, 1 Scott's N. R. 123.

ROBBERY.

Since the 1 Vict. c. 87, an indictment in the ordinary form for robbery cannot be supported by proof of extorting money by threats of charging an infamous crime, and a person present to aid A. B. to extort money by such charges cannot be convicted of robbery with A. B., effected by him with actual violence, the prisoner being no party to such violence.—*Reg. v. Henry*, 2 Moo. C. C. 118; 9 C. & P. 309.

SEDUCTION.

(*Form of action for.*) An action cannot be maintained by a father for the seduction of his daughter while she was in the domestic service of another person; although it be alleged in the declaration that she was there with the intention on the part of her father and herself that she should return to her father's when she quitted her service, unless she should go into another service.—*Blaymire v. Haley*, 6 M. & W. 55.

SEQUESTRATION.

Where a writ of sequestration was returned to the Exchequer before the plaintiff's execution was satisfied, the Court allowed it to be taken off the file and sent back to the bishop, that he might take the return off the writ, and certify to the Court what he had done under it. The rule for that purpose is absolute in the first instance.—*Alderton v. St. Aubyn*, 6 M. & W. 150; 8 D. P. C. 223.

SETTLEMENT.

1. (*By apprenticeship.*) Where the pauper is bound to and resides with his master during the indenture, a settlement is gained, though he never serves his master at his trade, or is instructed by him. (3 B. & Adol. 413.)—*Reg. v. Inhabitants of Burslem*, 3 P. & D. 38.
2. (*Statement of grounds of appeal.*) Where the statement of grounds of appeal set up a settlement by payment of rates, in or about the year 1830, "in respect of a tenement in T.:" Held, that the name of the landlord being omitted, evidence of the settlement was inadmissible. (6 Ad. & E. 885.)—*Reg. v. Justices of Sussex*, 3 P. & D. 42.
3. (*By apprenticeship.*) A master, not having sufficient employment for a parish apprentice, agreed with another person in the same trade as himself, but in a different parish, that the apprentice should work for him, he paying to the first 5s. per week, the apprentice worked accordingly, and lived with the second master for about three years, and until the expiration of his indenture, except for an interval of ten days when his first master, who was ill, sent for him back: Held, that this was putting away of the apprentice, without the consent of justices, within 56 Geo. 3, c. 139, s. 9, and that no settlement was gained in the parish of the second master.—*Reg. v. Inhabitants of Wainfleet, All Saints*, 3 P. & D. 72.

SHEEP STEALING AND KILLING.

Inflicting a wound on a sheep, of which it afterwards dies, with intent to kill, will support an indictment for killing with intent to steal the carcase, though the sheep does not die till two days afterwards.—*Reg. v. Sutton*, 2 Moo. C. C. 29.

An indictment under 7 & 8 Geo. 4, c. 29, s. 25, for stealing a sheep, is supported by proof of stealing an ewe or ram, though the statute specifies "ram, ewe, sheep, or lamb."—*Reg. v. M'Culley*, 2 Moo. C. C. 34.

SHERIFF.

1. (*Action for false return, how waived.*) A right of action against the sheriff for a false return to a fieri facias, is not waived by accepting the sum levied on account and in part satisfaction of the sum indorsed on the writ. (Overruling *Benzon v. Garratt*, 1 C. & P. 154.)—*Holmes v. Clifton*, 2 P. & D. 556.
2. (*Liability of, for not arresting.*)—A sheriff is not liable, under the Uniformity of Process Act, for neglecting to arrest on a capias ad respondendum within the four months, unless special damage accrue: And *semble*, that he is in no case liable, unless it appears that he has been guilty of some default, when the writ was returnable, either on his being ruled to return it, on the expiration of the four months. Therefore, where a declaration alleged that a writ of capias ad respondendum was delivered to the sheriff to be executed against R. T., and that the sheriff did not arrest in a reasonable time, and that R. T. did not cause bail to be put in according to the exigency of the writ, whereby the plaintiff was injured, and likely to lose his debt: Held, that the action was not maintainable, as it was consistent with the facts alleged that the sheriff might have arrested R. T. after the negligence averred, so as to enable the plaintiff to proceed with his action as speedily as if the sheriff had made the arrest on the first opportunity. (1 M. & W. 704; 7 D. P. C. 38; 2 C. & M. 413; 9 Bing. 740.)—*Randell v. Wheble*, 2 P. & D. 602.

3. (*Affidavit to discharge attachment against.*) A sheriff obtained a rule to discharge an attachment against him for not bringing in the body, on an affidavit stating that the application to be made "on his behalf, at his expense, and for his protection, and without collusion with the plaintiff or defendant, or any other person or persons whatsoever." The court held the affidavit insufficient within Reg. Gen. 59 Geo. 3, K. B. Mich., refused to allow it to be amended, and discharged the rule. The rule of court, K. B. 59 Geo. 3, is not superseded by 1 & 2 Vict. c. 110.—*Reg. v. Sheriff of Middlesex*, 3 P. & D. 120.
4. (*Application of payments by.*) In an action against the sheriff of Surrey for a false return of nulla bona; it appeared that the plaintiff's execution issued in June 1839, upon a judgment recovered against a mining company. In the year 1837, two writs of fieri facias had issued against the company at the suit of S. and E., under which A., the then sheriff, took in execution property to a considerable amount. Proceedings were taken in the Court of Chancery, and it was referred to the master to report as to the validity of the claims of S. and E. The goods were sold and valued at 943*l.* 18*s.* 8*d.*, which was paid by the under-sheriff into a banker's in Middlesex to his own account. Subsequently the master reported that 530*l.* only was due to S., and that nothing was due to E.; and it was ordered that the sheriff should be at liberty, after payment of the sum due to Solari, to pay the balance to the company. In 1837 the plaintiff had levied another execution against the effects of the company, and the balance of the proceeds of the sale was recovered by the under-sheriff, and paid by him into the above-mentioned bankers; on the 14th of June, 1838, the plaintiff lodged in the office of C., the then sheriff, the original *fi. fa.*; but no further step was taken until the 6th of June, 1839, when an alias was lodged with the present defendant; the same under-sheriff continued in office during the years 1837, 1838, 1839, and the balance of the money deposited in 1837 remained in the bank where the plaintiff's alias *fi. fa.* issued: Held, that the defendant could not apply the balance in satisfaction of the plaintiff's execution.—*Harri-son v. Paynter*, 8 D. P. C. 349.

SHIPPING.

1. (*Liability of charterer for detention of ship by frost.*) The charterer of a ship for the conveyance of a cargo from a foreign port, is not liable to the owner for the unavoidable detention of the ship by the frost, after the completion of the loading.—*Pringle v. Mollett*, 6 M. & W. 80.
2. (*Authority of master to borrow money.*) The master of a ship has authority by law to pledge the credit of his owner, resident in England, for money advanced to the master in an English port where the owner has no agent, if such advance of money was necessary for the prosecution of the voyage; and whether it was so or not is a question for the jury. (7 Price, 592; Abbott on Shipping, 116.)—*Arthur v. Barton*, 6 M. & W. 138.

USURY.

To an action against the acceptor of a bill of exchange, he pleaded that before &c., he was indebted to the plaintiff on an account stated; that it was corruptly agreed between them that the defendant should pay part of the debt, and should have three months' forbearance, and accept a bill at that date for payment of the residue, and should pay a sum, exceeding 5*l.* per cent., for such forbearance; and that the stipulated sums were paid, and the bill in question was given accordingly: Held, that the transaction was exempted from the

usury laws by the 3 & 4 Will. 4, c. 98, s. 7. (6 Ad. & E. 932.)—*King v. Braddon*, 2 P. & D. 548.

VENUE.

1. (*Affidavit to bring back.*) An affidavit to bring back the venue, made by the plaintiff's wife, is insufficient, unless it appear that the husband was too ill to attend before a commissioner to make one, and that she is fully acquainted with the nature and particulars of the action. The proper person to make the affidavit, under such circumstances, is the attorney.—*Williams v. Higgs*, 6 M. & W. 133; 8 D. P. C. 165.
2. (*Changing to third county.*) The venue was originally laid in A., and changed by the defendant to B. The plaintiff then obtained, by the defendant's consent, an order to change it to C. on an undertaking to give material evidence there: Held, that a judge had power to make the order.—*Leach v. Swallow*, 8 D. P. C. 199.

WARRANT OF ATTORNEY.

1. (*Attestation.*) A warrant of attorney is not vitiated by the fact that the name of the attorney who attests it on behalf of the defendant was first suggested by the plaintiff's attorney, if he was expressly adopted by the defendant as his attorney for that purpose.

A defendant may apply to set aside a warrant of attorney and the judgment thereon, on the ground of a non-compliance with the requisitions of the 1 & 2 Vict. c. 110, s. 9, although he have become bankrupt since the execution of it. (1 C., M. & R. 651.)—*Taylor v. Nicholls*, 6 M. & W. 91; 8 D. P. C. 242.

2. (*Same.*) Where, on the execution of a warrant of attorney, one attorney only was present, and attested it on behalf of the defendant, who had acted on previous occasions for the plaintiff, and who made out his bill for the obtaining and preparation of the warrant of attorney to the plaintiff, the Court held that he was not such an attorney "attending on behalf of the defendant," as to satisfy the 1 & 2 Vict. c. 110, s. 9, and set aside the warrant of attorney.—*Sanderson v. Westley*, 6 M. & W. 98.
3. (*Same.*) Where an attesting witness to a warrant of attorney refused to make an affidavit of the execution, to support a motion for judgment upon it, and it appeared that he colluded with the defendant, the Court made absolute with costs a rule to compel him to do so.—*Exp. Morrison*, 8 D. P. C. 94.
4. (*Judgment on old warrant of attorney.*) To obtain judgment on an old warrant of attorney, there must be a positive affidavit that the defendant has been seen alive within a reasonable period: mere inference is not sufficient, even though it appears that the defendant keeps out of the way.
Personal service of the rule nisi on the defendant will be dispensed with, where it appears that he keeps out of the way.—*Croft v. Lord Egmont*, 8 D. P. C. 95.
5. (*Same.*) In order to enter up judgment on an old warrant of attorney, an affidavit by the plaintiff that the money is still due, is necessary, unless its absence be accounted for, although the defendant has agreed that judgment shall be entered up.—*Barton v. Turner*, 8 D. P. C. 122.
6. (*Same.*) For such purpose it is indispensable that the warrant of attorney itself be produced.—*Jacobs v. Neville*, 8 D. P. C. 125.
7. (*Judgment against feme covert on.*) Where judgment was signed by mistake

against a married woman alone, on a warrant of attorney given by her *dum sola*, a rule nisi only was granted for vacating the judgment.—*Pocock v. Fry*, 1 D. P. C. 126.

8. (*Judgment against husband on.*) Judgment may be entered up against a husband, on a warrant of attorney given by his wife *dum sola*. (2 D. P. C. 764; 2 Chit. R. 117.)—*Higginbottom v. Higginbottom*, 8 D. P. C. 126.
9. (*Entering up judgment on.*) Where a warrant of attorney is given as a security to a person giving a guarantee, it is not necessary, in order to enter up judgment, to swear that any sum is owing upon it, if it be sworn that the guarantee is still in force.—*Pickering v. Carnell*, 8 D. P. C. 300.
10. (*Attestation.*) Where an attorney, although usually acting on behalf of the defendant, acts on the part of the plaintiff in preparing the warrant of attorney, his attestation is not sufficient to satisfy the 1 & 2 Vict. c. 110, s. 9. (4 B. & Adol. 371; 8 D. P. C. 207.)—*Rising v. Dolphin*, 8 D. P. C. 309.

WITNESS.

1. (*Competency—Release.*) Whether the objection to the competency of a witness appears on the record, or comes out on the *voir dire*, his competency is restored by his statement that he has a release, without his producing it. (M. & M. 319, 321, n.; 1 C. & P. 239; 8 C. & P. 97.)—*Lunniss v. Row*, 2 P. & D. 538.
2. (*Competency of.*) To prove the delivery of goods for which an action was brought, the plaintiff called his son, who on cross-examination admitted that the bill of parcels delivered with the goods, and headed, "Dr. to B. & Son," was in his handwriting, and that the "son" meant himself, the witness: but he swore that he was not partner with his father, and received no share of the profits: Held, that he was a competent witness.—*Barker v. Stubbs*, 1 Scott's N. R. 131.
3. (*Commission for examination of.*) A commission for the examination of witnesses abroad, under the 1 Will. 4, c. 22, s. 4, issued under a judge's order, which neither named the commissioners, nor the time, place, or manner of examination. The court set aside a verdict, which had been influenced by the evidence so obtained.—*Steinkeller v. Newton*, 1 Scott's N. R. 148.
4. (*Competency—Wife of bankrupt.*) The wife of an uncertificated bankrupt, who has released the assignees, is not a competent witness, in an action by the assignees, to prove a payment by the bankrupt to the defendant after the bankruptcy.—*Williams v. Williams*, 8 D. P. C. 220.
5. (*Commission for examination of.*) A rule to examine witnesses abroad, under 1 Will. 4, c. 22, s. 4, will be granted, if the names of *some* of the witnesses proposed to be examined are mentioned in the affidavits, though the names of others are not. (7 D. P. C. 294.)—*Beresford v. Easthope*, 8 D. P. C. 294.
6. (*Same.*) The court will grant a rule absolute in the first instance for quashing, at the plaintiff's instance, a commission obtained by him for the examination of witnesses abroad.—*Hodges v. Daly*, 8 D. P. C. 308.
7. (*Affirmation.*) A person, formerly a Quaker, who seceded from that sect on some points of doctrine, retaining their opinion on the unlawfulness of swearing, but refuses to affirm under the forms given, 3 & 4 Will. 4, c. 49, and 3 &

4 Will. 4, c. 82, is not admissible as a witness in criminal cases upon making the affirmation according to Geo. 4, c. 32.—*Reg. v. Doran*, 2 Moo. C. C. 37.

WOUNDING.

1. (*Punishment of hard labour.*) Under 1 Vict. c. 85, it is no defence to a charge for maliciously wounding, &c., that the offence would not have been murder, if death had ensued. Sentence of hard labour may be pronounced on all persons convicted of assaults under 1 Vict. c. 85, s. 11, upon indictments for felonies.—*Anonymous*, 2 Moo. C. C. 40.
2. A wound produced by a blow from the butt-end of a gun on the head, is within the 9 Geo. 4, c. 31, s. 2, though the part of the hat struck by the gun intervened, and was the cutting substance.—*Reg. v. Sheard*, 2 Moo. C. C. 13.
3. An indictment under 9 Geo. 4, c. 31, s. 12, charging a person with "feloniously, wilfully and maliciously" cutting, &c., is not enough, inasmuch as the statute, in creating the offence, uses the word "unlawfully."—*Reg. v. Ryan*, 2 Moo. C. C. 15.
4. An indictment under 7 Will. 4 and 1 Vict. c. 85, s. 5, need not specify the bodily injury dangerous to life; it is enough to specify the means. On an indictment for felony under that section against husband and wife, both may be convicted of assault.—*Reg. v. Cruise*, 2 Moo. C. C. 53.

WRIT OF ERROR.

1. Error lies in the Exchequer Chamber on a judgment of the Court of Queen's Bench, in error from the Common Pleas at Lancaster. (1 Ad. & E. 434; 8 Bing. 204.)—*Nesbit v. Rishton*, 2 P. & D. 706.
2. (*Supersedeas.*) A writ of error coram vobis is not a supersedeas in itself, but it is necessary to apply to the court for leave to issue execution. (8 East, 412; 2 M. & W. 533.)—*Semple v. Turner*, 8 D. P. C. 246. See *Gibbs v. Trevanion*, ib. 140.

WRIT OF INQUIRY.

(*Staying proceedings on—Privileges of Parliament.*) The court will not, at the instance of the sheriff, stay the execution of a writ of inquiry on a judgment by default in an action for a libel, on the ground that the House of Commons has voted the libel to be a privileged publication and all persons concerned in bringing any action in respect of such publication guilty of a breach of the privileges of the House.—*Stockdale v. Hansard*, 8 D. P. C. 148.

And if the sheriff do not return the writ in due time, the court will compel him, by rule absolute in the first instance, to do so.—*S. C. ibid.* 297.

WRIT OF RIGHT.

Where the tenant, in a writ of right, demurred specially to the court, and on nil dicit by the demandant, entered up final judgment, viz. that the demandant be in mercy, &c., and he, the tenant, hold the tenements quit of the demandant and his heirs for ever, the Court of King's Bench, on a writ of error from the Common Pleas at Lancaster, reversed so much of the judgment below as adjudged that the tenant should hold the tenements quit of the demandant and his heirs for ever, no issue having been joined: and the Court of Exche-

quer Chamber affirmed the decision of the King's Bench. (Bro. Abr., Droit de recto, pl. 16; Q. B. 26 Hen. 8, f. 8, pl. 6; Co. Lit. 295, b; Goldsb. 60.)
—*Rishton v. Nesbit*, 2 P. & D. 706, 712.

WRIT OF TRIAL.

(*Amendment of issue in.*) Where the copy of the issue delivered to the defendant varied from the roll, blanks being left therein for the teste and return of the writ of trial, the court allowed it to be amended on payment of costs.—*Watts v. Bull*, 1 Scott's N. R. 173.

EQUITY.

[Containing 1 Beavan, Part 3.]

ADMINISTRATION OF ASSETS.

(*What amounts to appropriation.*) An executor, who was also trustee, having paid to the adult legatees their shares of the then ascertained residue, invested in his own name the shares of infant legatees, for whose maintenance he was bound as trustee to apply the dividends, but did not execute any declaration of trust. He subsequently applied these shares to his own use, after which further assets of the testator's estate fell in: Held, that they were applicable in the first instance in making good the infant's legacies.—*Willmott v. Jenkyns*, 402.

ADOPTION. See AGREEMENT, 1.

AGREEMENT.

1. (*Right of third parties under an agreement.*) The father of the plaintiff, when the latter was only five years old, entered into an agreement with A., whereby the latter, in consideration of 100*l.* paid him by the father, undertook from that time to board, lodge, educate and maintain the plaintiff as if he were his own son, and to leave him all his property at his death. No sufficient evidence was given of the 100*l.* having been paid, or that the plaintiff ever resided with A. under the agreement: Held, in a suit against the representatives of A., that both parties to the agreement must be taken to have renounced it by consent, and that they were entitled to do so, no alteration in the *status* or condition of the plaintiff having taken place in consequence of it. (*Colyear v. Lady Mulgrave*, 2 Keen, 81.)—*Hill v. Gomme*, 540.
2. (*Waiver.*) A. being entitled to an undivided moiety of a piece of ground, agreed with B. that in case either of them should purchase the other moiety, they would divide the whole between them in a particular manner; the moiety was bought by a third person; whereupon A. and B. further agreed that neither of them would purchase such moiety until they had agreed upon a sum to be given for it, subject to the stipulations of the former agreement. B. afterwards entered into negotiations for the purchase of the property, to which he solicited the concurrence of A., and particularly as to fixing the price; but A. declined doing so; upon which B. bought the property, but afterwards offered to A. to carry the original agreement for partition into effect, but A. refused to have any thing to do with him: Held, that this was a waiver of the agreement by A., and that he could not set it up as a defence to a suit by B. for partition in the ordinary way.—*Morris v. Timmins*, 411.

ANNUITY. See PRACTICE, 7.

CHARITY.

1. (*Appointment of trustees pending an information.*) Pending an information filed for the appointment of new trustees, (and for another purpose also), and praying for an injunction to restrain the then trustees, one of whom was alleged to be imbecile, from appointing new ones, as they had power to do under their deed of foundation, such trustees did of their own authority appoint other trustees: Held, that this act was not a contempt, and was not altogether void, but that it imposed on the trustees the necessity of proving at their own expense that the appointment was right and proper, particularly as regarded the competency of the invalid trustee to concur in it, and upon their failing to do so, that the appointment should be set aside, and the additional costs arising from it paid by them.—*Attorney-General v. Clark*, 467.
2. (*Free school—Age of scholars.*) Where the entrance of boys under twelve years of age had been discouraged, the Court expressed its disapprobation of such a course without making any order on the subject.—*Re Rugby School*, 457.
3. (*Free school—Rights of foundationers—Previous order of Court.*) Where in a previous suit instituted like the present, to restrain the giving exhibitions to other than foundationers, the Lord Chancellor had made an order giving leave to the trustees to elect more exhibitioners in the manner they had done, the Court thought itself precluded from giving any relief inconsistent with such order.—*S. C.*
4. (*Grammar school.*) The school was designated by its founder as a Grammar School, but the boys were to be taught writing and arithmetic in all its branches: Held, that boys who could read English, and were capable of being taught the first elements of grammar, were qualified for admission.—*S. C.*

CONSTRUCTION.

- (*General words in deed controlled by intention.*) Where there was a doubtful claim against the estate of an intestate, which if unsatisfied would have left a surplus, but which the surplus, after paying all other demands, was insufficient to pay the sole next of kin, who was the father, not admitting the validity of such claim, agreed, out of regard for his son's character, to give up the surplus, if the administrator who was a surety for the debt, supposing it to be a valid one, would contribute the remainder of what was wanted for payment of it, and by deed, which recited that the assets then in the hands of the administrator were all the assets belonging to the estate, the father released to the administrator, in consideration of his covenant to pay the debt, the whole of his right and interest, &c. in the personal estate of the intestate. The debt was accordingly paid, and after that assets fell in: Held, that they were not included in the release, and that the administrator was not even entitled to recoup himself out of them what he had contributed towards the debt.—*Lindo v. Lindo*, 496.

And see TRUSTEE, 2.

CONTEMPT. See CHARITY, 1.

COSTS. See MORTGAGEE; NEXT FRIEND; PARTITION; PROVISIONAL ASSIGNEE.

DECREE.

- (*Further directions restricted by terms of decree.*) Executors were charged by the bill with what they might "but for their wilful default have received," but by the decree the common accounts only were directed; On further directions, Held, that the executors could not be charged as for their wilful default, and

an inquiry was refused, though a presumption of such default was raised by the master's report.—*Garland v. Littlewood*, 527.

DELIVERY UP OF DEEDS. See SOLICITOR AND CLIENT, 1.

EVIDENCE.

1. (*Competency of witness*—3 & 4 W. 4, c. 42, ss. 26, 27.) This statute does not give competency to a witness having an interest in the subject of the suit; and accordingly, in a suit by the assignee of an insolvent to increase his estate, a creditor of the insolvent is not a competent witness for the plaintiff. (*Stewart v. Barnes*, 1 Moo. & Rob. 472; see next case.)—*Holden v. Hearn*, 445.
2. (*Same point*.) Where a sum due on bond was bequeathed by the obligee, and the legatee brought a suit to recover it against the executor: it was held, that the obligor was not a competent witness in such a suit to prove the invalidity of the bond.—*Davies v. Morgan*, 405.

EXECUTORS.

(*Liability*.) It was the opinion of the Court, though it was not necessary to act on it, in the case of a claim under an agreement creating, as was alleged, a trust for plaintiff, brought forward nine years after testator's death, at which time the agreement was first discovered, that the executor, who after duly advertising, had long ago distributed the estate, would have been liable if the agreement had been valid. The plaintiff was an infant within six years of bringing the suit.—*Hill v. Gomme*, 540.

And see WILL, 4.

FRIENDLY SOCIETY.

(*Summary jurisdiction*.) Where the members of a friendly society had directed a sum to be invested in a bank in the joint names of the treasurer and another member, and that sum was afterwards misapplied, the Court refused to exercise its summary jurisdiction, under the 33 G. 3, c. 54, against the treasurer, because the party who was jointly liable with him was not amenable to that jurisdiction.—*Re Heanor Friendly Society*, 508.

GENERAL EQUITY. See AGREEMENT, 1; PRINCIPAL AND SURETY.

GIFT INTER VIVOS.

(*When complete*—*Order to bankers*.) A. B. wrote a letter to his bankers directing them to invest a sum of money in the joint names of himself and wife. The bankers accordingly caused a purchase to be made by their brokers the day before, but the transfer was not made till the day after the death of A. B.: Held, that the gift was completed by the bankers acting on the order to the extent of making a contract by the broker.

N.B. The order which was delivered to the wife was not sent by her to the bankers till two days afterwards.—*Vance v. Vance*, 605.

HUSBAND AND WIFE.

(*Wife's equity*.) A wife, after having established her equity to a settlement against the husband's assignee, cannot waive her equity so as to prejudice the rights of children of the marriage.—*Whittem v. Sawyer*, 593.

INFANT.

(*Compromise of suit*.) A suit for an account, in which the defendant was an infant, was allowed to be compromised at the hearing without a reference, the

facts of the case being brought before the Court, on exceptions to a report, and the proposed compromise appearing to be clearly for the benefit of the infant.—*Lippiat v. Holley*, 423.

And see NEXT FRIEND; PLEADING.

MORTGAGEE.

(*Costs of suit.*) A satisfied mortgagee who refused to reconvey to the devisee in trust of the mortgagor, except under direction of the Court, was allowed his costs as between solicitor and client. It was stated in the answer that the mortgagor in his life-time had purposely left the legal estate outstanding. The cestui que trusts under the mortgagor's will were held not necessary parties.—*Poole v. Pass*, 600.

And see RECEIVER.

NEXT FRIEND.

1. (*Costs.*) A suit instituted by next friend on behalf of infants, was dismissed with costs to be paid by next friend, on report of the master that it had been not properly instituted.—*For v. Suwerkrop*, 583.
2. (*Same.*) Where it appeared clearly by affidavits on the part of defendant, that a suit had been instituted by the next friend of an infant to promote purposes of his own. The suit was dismissed with costs to be paid by him, without a reference.—*Sale v. Sale*, 586.

PARTIES.

1. (*Joint mortgage.*) The representatives of one of two mortgagees were held necessary parties to a suit by the survivor, though it was alleged but not proved that it was a mortgage in trust, and that the representatives of deceased mortgagee had therefore no interest either in equity or in law.—*Vickers v. Cowell*, 529.
2. (*Misjoinder.*) Where in the event of the defendant being unable to replace a fund which he had improperly sold out, one of the plaintiffs who had sued as the executrix of the trustee, might have been liable in respect of his neglect to make good the deficiency out of his assets; it was held, that she was improperly joined as plaintiff with parties having only a beneficial interest.—*Jacob v. Lucas*, 436.

And see MORTGAGEE.

PARTITION.

1. (*Costs.*) Although costs are not usually given in a partition suit, yet if defendant relies on a collateral defence, as an agreement to divide in a particular way, if such defence fails, costs will be given against him.—*Morris v. Timmins*, 411.
2. (*Road—Special directions.*) The Court refused to give any special direction to the commissioners respecting a road, which, as stated in the bill and admitted in the answer, had been set out by agreement between the defendant as the owner of one moiety and a previous owner of the other.—*S. C.*

PATENT.

(*Requisite degree of novelty.*) Where the improvement relied on in support of a patent for new machinery for spinning flax, was the shortening the reach at which it was spun to a distance of about two inches and a half, and it appeared that in the machinery used for spinning different materials, including flax, the principle of shortening the reach according to the material was known, and

that though in the machinery for spinning flax the minimum was fourteen inches, for cotton it varied from an inch and a quarter to seven eighths of an inch; it was held, agreeably to the certificate of the judges, (see *Bing. N. C. 492*,) that there was not sufficient novelty to support the patent. The object of the short reach, as applied to flax, was to spin it in a macerated state, but the plaintiff did not pretend that the maceration of flax for the purpose of spinning it was altogether new, but that the shorter reach enabled him to employ maceration in a much greater degree.—*Kay v. Marshall*, 534. See *S. C.* as to other points, 1 *M. & C.* 373; 1 *Keen*, 190.

PERSONAL ESTATE.

(*Ineffectual conversion.*) Where personal property is directed by will to be invested in real estate for certain purposes, which fail before the investment is made; as where it is to be laid out in the purchase of land to be settled on certain limitations, which are exhausted before the purchase, there is a resulting trust to the next of kin.—*Hereford v. Ravenhill*, 481.

PLEADING.

(*Infant—Admission—Statement.*) The admissions of an infant defendant do not relieve the plaintiff from the necessity of proving the facts admitted.

An infant must state by his answer facts not otherwise in issue, to make evidence of them admissible on his part.—*Holden v. Hearn*, 445.

And see DECREE; PRACTICE, 9; STATUTE OF FRAUDS.

POWER.

(*Evasive execution.*) An appointment made by the author of the power to one who was within the terms of the power, on condition of his giving a bond for the amount appointed, to persons who were not the objects of the power, was held void, in a suit by the trustees of the deed to declare the rights of the parties in the sum appointed, although the power was created in a voluntary deed, and it appeared by the recitals to be the intention of such deed to include within the terms of the power those in whose favour the bond was taken; the Court saying, that in this suit it could not act upon any notion that in a suit differently constituted the parties might have been entitled to relief on the ground of mistake.—*Lee v. Fernie*, 483.

PRACTICE.

1. (*Absence from jurisdiction.*) The proper mode of proving that a party, who does not appear at the hearing, is out of the jurisdiction, is by exhibiting an interrogatory with leave of the Court and not by reference.—*Dibbs v. Goren*, 457.

2. (*Accountant-general's cheque.*) Where a cheque of the accountant-general, dated more than a year ago, was alleged to have been accidentally destroyed, the Court, though not satisfied with the evidence of that fact, ordered a new one to be given, on the ground that the other being more than a year old, according to the practice of the bank as to cheques of the accountant-general, would not be paid if presented.—*Taylor v. Scrivens*, 571.

3. (*Amendment at the hearing.*) Leave to amend at the second hearing was given with great reluctance, and on payment of all costs of the original and present hearing, where leave to amend had already been given once at the first hearing, and the suit was still in a very defective state.—*Bierderman v. Seymour*, 594.

4. (*Impertinence—Schedule.*) An exception for impertinence must be supported in toto or will fail altogether. Accordingly where in a schedule of deeds the descriptions as well as the names of the parties were stated, and the exception covered all but the dates (the other parts being inclosed in brackets), the exceptions were overruled, because though the descriptions were impertinent the names were not.—*Tench v. Cheese*, 571.
5. (*Multifarious notice.*) A plaintiff having obtained after the proper time an order as of course to amend, the defendant being entitled to dismiss for want of prosecution, gave notice of one motion to discharge the irregular order and to dismiss: Held, that such notice was not multifarious.—*Traile v. Bull*, 475.
6. (*Payment of money out of Court.*) Money was ordered to be paid out of Court on motion, where the rights of the parties had been ascertained by arbitration. (*Heathcoate v. Edwards*, Jacob, 504.)—*Oliver v. Burt*, 583.
7. (*Prospective order.*) Where the corpus of a fund was liable to the payment of an annuity, if, as was clearly the case, the dividends were insufficient, the Court (on the authority of *Swallow v. Swallow*, reported in the note) made an order for the sale from time to time of so much of the fund as should be necessary to make up the deficiency.—*Hodge v. Lewin*, 431.
8. (*Reference.*) A reference will not be granted as to the fact on which the foundation of plaintiff's title rests; and accordingly where the assignee of an insolvent omitted to prove that a fund which he claimed to recover as having been fraudulently settled, had ever been the property of the insolvent, a reference as to the fact was refused.—*Holden v. Hearn*, 445.
9. (*Relief between co-defendants in supplemental suit.*) Pending a suit against an agent for reconveyance of an estate purchased of his principal, defendant sold part of the property, after which a decree was made for reconveyance with the usual accounts. After that a supplemental bill is filed against the purchasers, to which the personal representatives of the original defendant (who had died during the original suit) were made parties, as being interested in the account against the purchasers. In this suit a decree was made for repayment to the purchasers of their purchase money by the representatives of the original defendant.—*Trevelyan v. White*, 588.
10. (*Security for costs.*) Where plaintiffs, at the time of filing the bill having no fixed residences, described themselves as of certain places, to which, as appeared afterwards on the motion, they were in the habit of referring for their addresses, this was held not to be such a misdescription as should subject them to give security for costs.—*Simpson v. Burton*, 556.
11. (*Transmission of money from abroad.*) Where a large sum of money belonging to an estate in which a receiver had been appointed was in India, the Court refused, on the petition of the receiver, to make an order as to the mode of transmitting such money, without a reference.—*Keys v. Keys*, 425.
12. (*Trustee*, 1 Will. 4, c. 60.) Where one of two executors, defendants in an administration suit, was stated by affidavit to be out of the jurisdiction, an order was made for the transfer of a fund, under the 1 Will. 4, c. 60, without a reference, it appearing from the proceedings in the cause, as was stated in the order, that he was a trustee within the meaning of the act.—*Parker v. Burney*, 492.

PRINCIPAL AND SURETY.

(*Parties—Release of principal—General equity.*) The bill stated that the creditor had, with the verbal consent of the surety, released the principal by deed, and that in an action he had brought against the surety, the latter had set up this release as a defence, against which no evidence or a parol consent was admissible at law. The principal was not made a party to the bill. A demurrer for want of parties and equity was allowed for want of parties—the Court intimating it would not have been allowed for want of equity.—*Brooks v. Stuart*, 512.

PROVISIONAL ASSIGNEE.

(*Costs.*) The provisional assignee of an insolvent, no creditor's assignee being as yet appointed, having been made a party to a foreclosure suit, it was ordered that the plaintiff should pay him his costs and add them to his security.—*Boswell v. Tucker*, 493.

RECEIVER.

(*West India produce—Crops severed.*) A receiver is entitled generally to rent in arrears at the time of his appointment; but it was held that a receiver of a West India estate, appointed at the suit of a mortgagee, was not entitled to the produce of crops severed and shipped to the consignees or the mortgagor before the date of the receiver's appointment.—*Codrington v. Johnstone*, 520.

REFERENCE.—See **PRACTICE**, 11, 12.

RESULTING TRUST.—See **PERSONAL ESTATE**.

SOLICITOR AND CLIENT.

1. (*Lien on deeds.*) A solicitor, who had by deposit of his client a lien on deeds for costs and other monies, was ordered to deliver them up to his client on payment into Court by the latter of a sum sufficient to cover the demand, to be stated by affidavit of solicitor, the case being distinguished from that of *Livesey v. Harding*, 1 Bea. 343, by the relation between the parties as solicitor and client.—*Mills v. Finlay*, 560.

2. (*Taxation of costs.*) Where in an administration suit the claim of a solicitor for costs had upon taxation been reduced by more than one-sixth, he was made to pay the costs of taxation.—*Silvertop v. Ramsay*, 434.

STATUTE OF FRAUDS.

(*Demurrer.*) The Statute of Frauds may be taken advantage of on general demurrer; but where a bill for specific performance did not expressly admit that the agreement was not signed, and contained allegations of part-performance, a general demurrer was overruled.—*Field v. Hutchinson*, 599.

SUPPLEMENTAL SUIT.—See **PRACTICE**, 9.

TAXATION OF COSTS.

(*Joint liability.*) Where an action for costs had been brought at law against two parties who were jointly liable, the Court refused to stay proceedings at law, and direct taxation on the undertaking of one defendant only to pay what should be found due.—*Re Chilcote*, 421.

TRUSTEE.

1. (*Bankruptcy.*) A bankrupt trustee was ordered to be removed, although he had obtained his certificate, and the estates was in the hands of a receiver.—*Bainbrigge v. Blair*, 495.

2. (*Compensation for Loss of Time.*) When testator declared that "his trustees should be entitled to receive all costs, charges, and expences, fees to counsel, and for advice and for professional assistance and loss of time," one of the trustees who was a land surveyor, was held entitled to compensation for loss of time.—*Willis v. Kibble*, 559.
3. (*Feme sole.*) The Court refused to make an order allowing a feme sole to be proposed as trustee.—*Brook v. Brook*, 521.
4. (*Liabilities of, on failure of bank.*) Where executors and trustees deposited in a bank at interest money of the testator which it was not pretended they were likely to want on account of the estate, the debts and legacies having been duly paid, and the bank broke, the executors were held liable for the loss.—*Darke v. Martyn*, 525.
5. (*Reparation of breach of trust—New appointment.*) The representatives of a surviving trustee who had concurred with his co-trustee in a breach of trust by lending to the tenant for life on his promissory note, were held entitled to file a bill against such tenant for life, and the other cestuique trusts, for replacing the funds, and the appointment of new trustees, with costs against the tenant for life, or out of the fund.—*Greenwood v. Wakeford*, 576.

And see (*Feme Sole*), PRACTICE, 12.

WILL.

1. (*Construction—Absolute interest.*) Testator desired his daughter's share to be secured in the funds, and for his trustee to pay her the dividends, and he wished that neither the principal, or interest, or the funds, should be subject to the control or debts of any husband she marries, but the same shall stand under the direction of the Court, subject to her will only: Held, that the daughter took an absolute interest.—*Tawney v. Ward*, 563.
2. (*Construction—Bequest to debtor.*) Where a testator gave a legacy to his debtor on condition of his paying the debt before his the testator's decease, or immediately afterwards to his executors, and then accepted a composition; Held, that the debtor was entitled to the legacy.—*Gath v. Burton*, 478.
3. (*Construction—Cumulative legacy.*) Several annuities given by will and codicils, held to be cumulative, though with some hesitation, the chief doubt being whether a legacy of 20*l.* to a husband was revoked by a subsequent bequest of 10*l.* each to him and his wife.—*Spire v. Smith*, 419.
4. (*Construction—Description of property.*) Stock which was standing in the joint names of a husband and wife, was held not to be included in the will of the former by the description of "all the property he was in possession of," but it was held that the executors were justified in seeking the opinion of the Court upon the point.—*Low v. Carter*, 427.
5. (*Construction, "one child"—Estate in fee.*) A testator at the time of making his will had four children, one of them married (who had then one daughter), and three others unmarried. He gave an estate to one of the four for life, remainder to "one child" of each, provided that if the three then unmarried, naming them, should never have any lawful children, their part should go to the next of kin: Held, that the first born child of each of the four children took a fourth share in fee, as they successively come in esse.—*Powell v. Davies*, 532.
6. (*Construction—Specific legacy.*) A legacy given in the following terms, "I give to A. B. the sum of 100*l.*, which said sum is owing to me by bond from

her father." Held to be specific and not demonstrative.—*Davies v. Morgan*, 405.

7. (*Construction—Survivors.*) Testator gave the residue among his five grandchildren, A., B., C., D., and E., his grandson A.'s two children, and the two children of his niece, one of them a son, the other a daughter; and in case any of the said last mentioned children should die before twenty-one and should leave no lawful issue, then the survivors were to have his or her share; one of the children of A. died under twenty-one without issue: Held, that his share was divisible among all the surviving legatees.—*Walker v. Moore*, 607.
 8. (*Construction—Vesting—Survivorship.*) Where there was a bequest and devise to a trustee to pay the proceeds to testator's wife so long as she continued unmarried, and after her decease testator bequeathed his property to his children who should be then living, and an allowance uncertain in amount was to be made to the wife if she married again and the children continued to reside with her: Held, that there was no vested interest in the children during the mother's life.—*Tawney v. Ward*, 563.
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BANKRUPTCY.

[Containing 1 Montagu and Chitty, Part 2, omitting cases noticed in former digests.]

ACT OF BANKRUPTCY.

(*Conditional declaration of insolvency.*) Where the bankrupt signed a declaration at the instance of his creditors, not to be used or filed unless it afterwards became necessary; Held, that in the absence of evidence of bad faith, the creditors had a discretionary right to file the declaration.—*Ex parte and re Rowe*, 334.

ASSIGNEES.

(*Suit by—Consent of creditors.*) Where assignees had instituted a suit with the consent of the majority of the creditors who had then proved, but afterwards many other creditors having proved, an application was made on behalf of the then majority to restrain the assignees from further proceeding with the action, the Court refused to make the order, (Sir G. Rose observing that they had no authority to do so) but it was referred to the commissioners to inquire how much of the estate in the hands of the assignees ought to be reserved to abide the result of the suit, to answer the costs of the assignees, if it should be held that they were entitled to such costs.—*Ex parte May re Jones*, 285.

EQUITABLE MORTGAGE.—See SPECIAL CASES, 1.

EVIDENCE.—See PRACTICE, 11.

FIAT.

(*Time of suing out—What amounts to “suing out.”*) The date of the application for the fiat is with reference to the two months allowed after act of bankruptcy, to be taken at the date of the suing out; and the fiat will not be prejudiced by a subsequent delay either in the signing or the delivery, not arising from the fault of the creditor.—*Ex parte and re Rowe*, 334.

JURISDICTION.—See OFFICIAL ASSIGNEE; PETITIONING CREDITOR, 1.

OFFICIAL ASSIGNEE.

(*Remuneration—Per-centage.*) The Court of Review has no jurisdiction over the amount of allowance made by the commissioners to the official assignee if it is put merely on the footing of *quantum meruit*, but when it was alleged that the allowance had been made by way of commission or per-centage as it usually is, in pursuance of the recommendation in the general orders of 12th January, 1832, the Court of Review has jurisdiction as to whether the per-centage has been properly allowed on any particular fund, and where it had been allowed on the proceeds of a lease mortgaged by the bankrupt, which on a sale by the official assignee and creditors' assignee were paid directly to the equitable

mortgagee by the purchaser, the Court declared that such allowance was wrong, and the certificate of the commissioner not being before the Court, it was ordered that he should review the allowance, having regard to the above declaration.—*Whisson, Ex parte re Carter*, 274.

PETITIONING CREDITOR.

1. (*Alleged misconduct.*) Where the petitioning creditor was a solicitor, and the debt his bill of costs, on petition to supersede for the insufficiency of the debt the Court refused to entertain charges of neglect and misconduct against the petitioning creditor, as solicitor, whereby he had lost as was alleged his right to recover his bill.—*Ex parte and re Southall*, 346.
2. (*Disqualification.*) A party to the deed creating the act of bankruptcy cannot be petitioning creditor.—*Re Cook*, 349.
3. (*Irregularity.*) Where a petitioning creditor after the issuing of the fiat had with bona fides, and being ignorant of the illegality of the act, received part payment of his debt, and had since refunded the money, the fiat was sustained.—*Ex parte Nesbitt re Mould*, 363.
4. (*Substitution.*) Where the debt sworn to by the first petitioning creditor was on a bill of exchange not then in his hands; a second petitioning creditor was substituted, at the costs of the former.—*Ex parte Catiley re Goodwyn*, 360.

PRACTICE.

1. (*Alteration of date.*) Where the date of the certificate by commissioner, of consent of creditors to annulling, appeared to have been altered, on affidavit made that the alteration was before signing, ordered that the certificate pass.—*Ex parte and re Brown*, 361.
2. (*Amendment of fiat—Mistake.*) Where a fiat had by mistake been taken out in the name of two as for a joint debt, whereas in fact the debt was a single one, the Court refused leave to amend the fiat, but gave leave to take out a new one.—*Ex parte Rhands re Morris*, 348.
3. (*Bankrupt—Trustee.*) Where the property was small a new trustee was appointed in lieu of the bankrupt, without a reference, but in such a case there must be an affidavit of fitness.—*Ex parte Palmer re Peach*, 364.
4. (*Direction of fiat.*) Venue of fiat changed from Southampton to London; the alleged object being to set aside fraudulent preference to a creditor in London, where the witnesses resided, and the property of the bankrupt was supposed to be concealed.—*Re William James*, 349.
5. (*Same.*) Not changed from Newcastle to Manchester, though more than two thirds in number and value of the creditors, as well as the witnesses of the act of bankruptcy (which was there committed), resided in the latter place.—*Re Storey*, 362.
6. (*Joint fiat—Error in title of petition.*) A petition to supersede a joint fiat under which one only had been declared a bankrupt, being entitled in the matter of the one so declared only, was held defective, but the order was made on the title being amended.—*Ex parte and re Fisher*, 345.
7. (*Second fiat by same creditor.*) Leave given to a creditor to issue a second fiat, after he had through inadvertence allowed the time for prosecuting the first (under 1 & 2 Vict. c. 110) to expire.—*Re Knibb*, 290.
8. (*Mistake in name.*) An error in the christian name of petitioning creditor,

occurring in one part only of the docket papers, allowed to be amended without prejudice to the application of a second petitioning creditor.—*Re Sale*, 350.

9. (*Old certificate.*) On a petition to supersede, founded in part on a certificate of commissioners in 1828, the Court refused to act without referring it back to those commissioners.—*Ex parte and re Marindin*, 282.
10. (*Petition to prove.*) The Court of Review have no original jurisdiction on the question of right to prove, but in cases where there is an objection of form they can make an order to enable the party to tender proof; consequently, a petition by trustees to prove against the estate of a bankrupt co-trustee, for trust monies alleged to have been misapplied by him, was dismissed with costs.—*Ex parte Smith re Clark*, 347.
11. (*Vivâ voce examination.*) An application to examine A. B. *vivâ voce* on the ground that he had given information but refused to make an affidavit; not granted, because the refusal to make an affidavit would have let in secondary evidence by affidavit, of what A. B. had said.—*Ex parte Goodbody v. Freeman*, 283.

And see OFFICIAL ASSIGNEE; PETITIONING CREDITOR, 3.

SPECIAL CASES.

1. *Ex parte Pollard*, re Courtney, 3 Mont. & Ayr. 340; L. M. No. 40.
(*Conflict of laws—Scotch law—“Lex loci contractus.”*) Although by the Scotch law no lien is created by deposit of deeds, which was stated as a fact in the special case, yet as the depositor as well as the bankrupt resided in England, as did also the assignees, and there being no competition with any person having obtained a title under the Scotch law; it was held by the Lord Chancellor reversing the judgment of the Court of Review, that the assignees held the property subject to the lien.—p. 350.
2. *Ex parte Terrewest*, re Poynter, 1 Mont. & Ch. 147; L. M. No. 46.
(*Usury—Renewable bills.*) Held, by Lord Chancellor reversing the judgment of the Court of Review, that the transaction was not usurious. The special case did not state a contract to renew the bills; but the Lord Chancellor was of opinion that even a contract to renew the bills would not have been usurious according to the decision in *Holt v. Miers*, 3 Meeson & Welsby, 168, which the Lord Chancellor approved of.—p. 351.

USURY.—See SPECIAL CASE, 2.

HOUSE OF LORDS.

[Containing Clark & Finelly, Vol. V. Part I., omitting cases noticed in former digests.]

BILL OF EXCEPTIONS.

(*Argument confined to record.*) A Bill of exceptions stated that a deed had been proved, and set forth an extract from it, followed by these words, "as by said indenture of release will appear:" Held, that no other part of the deed could be read on argument of the bill of exceptions on writ of error.—*Calwey v. Baker*, 457.

CHARITY.

(*Uncertain objects.*) A gift by Scotch deed of disposition of the residue of real and moveable estate to trustees, to be applied to such benevolent and charitable purposes as they should think proper, accompanied with a recommendation of certain particular objects in the event of the residue exceeding 600*l.*, was held good; but the residue having amounted to 12,000*l.*, all parties were allowed out of it the costs of trying the question.—*Miller v. Rowan*, 99.

In an unreported case of *Williams v. Kershaw*, decided at the Rolls in 1835, which is given in a note to the last case, where a testator, after giving bequests to certain *specific* benevolent charitable and religious objects, gave the residue to such benevolent charitable and religious objects as his trustees in their discretion should think fit; the bequest was held void for uncertainty, but the objection of uncertainty has less force in the Scotch law.

CONFLICT OF LAWS.

(*Contract governed by law of place where enforced.*) A Scotchman, being then detained in France as a prisoner, in 1809 accepted a bill of exchange payable, as it was held, in Paris, but before the day of payment arrived he had returned to England. In 1810 proceedings were instituted in France against him and the drawer, and a decree was made against him in his absence, according to the practice of the French Courts. In 1820 he died; and in 1829 an action founded both on the bill and the French judgment was brought against the son. The question was, 1st, which law should govern the case; whether the Scotch law of prescription limiting the right to recover on bills of exchange, &c. to those cases in which "diligence shall be raised and executed or action commenced thereon within six years after the sums due on such bills shall have become exigible," or the French law of prescription, which fixing a period of five years in the first instance, allows a further time of thirty years for giving effect to any judgment pronounced within the five. 2dly, whether the right under the foreign judgment was barred by the Scotch law of prescription. This latter point is but little adverted to in the judgment: Held, reversing the judgment

of the Court of Session, that the case was governed by the Scotch law in every thing relating to the enforcement of the contract, and that the claim was barred by prescription.—*Don v. Lippman*, 1.

TRUST.

1. (*Gift to trustees as such.*) A Scotchman, by trust, disposition, and settlement, gave the whole of his real and moveable estate to three persons by name, or such of them as should accept, and to such persons as might be assumed by them to supply the place of those who should die or decline to act as trustees or trustee, for the ends, uses, and purposes after specified; viz. 1st, to pay debts; 2dly, to pay certain specified sums; 3dly, to lend out 2000*l.* on security, taking the interest, payable to A. for life, and the said principal sum payable to his said trustees, or their foresaids, at A.'s death: Held, that this was not a gift to the trustees for their own benefit, but that the 2000*l.* at A.'s death fell into the general trust estate.—*Miller v. Rowan*, 99.
2. (*Words of recommendation—Appointment of agent.*) Held, agreeably to the decision of Lord Plunket, but in opposition to that of Lord Chancellor Sugden, that the expression in a will of "testator's particular desire that the executors and the tenant for life of a certain devised estate should employ a particular person in the receipt of profits and management of the said estate, and any other that should be purchased and settled out of the personal estate, at the usual fees allowed to agents, such person having acted in that capacity for the testator fully to his satisfaction," did not impose any obligation on the tenant for life to employ such person as his agent, but that he had a discretionary right to dismiss him.—*Shaw v. Lewis*, 129.

APPEAL ON REPORTED CASE.

- (*Thelluson's Act.*) *Shaw v. Rhodes*, 1 M. & C. 135; L. M.—The decision in this case declaring a direction to accumulate rents and profits for twenty years after the death of the survivor of testator's children void, affirmed.
- The name of the case on appeal is *Evans v. Hellier*, 114.
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PRIVY COUNCIL.

[Containing cases in 1 Moore, part 3.]

ALIEN.

(*Law relating to, in colonies.*) The status of a man, as whether alien or not, is to be determined by the law of this country; but the rights and liabilities incident to that status are fixed by the law of the colony where he has been or is a resident.

Accordingly it was determined, 1st, that a Frenchman who had resided in the Mauritius, and had filled the office of assignee of insolvent estates, and been admitted to take the oath of allegiance, was clearly an alien: 2nd, that according to the French law, which by the treaty of cession in 1810 prevails in the Mauritius, the circumstances of the case did not constitute that "*authorisation by the government*," in the absence of which, according to the French law, an alien may be removed without cause shown.—*Re Adam*, 460.

ATTORNEY.

(*Suspension of, by governor.*) An order suspending an attorney from practice upon grounds stated therein, (particularly that he had abused his privilege of freedom from arrest,) but not referring to any affidavit in proof of such grounds, was discharged as irregular.—*Re Monckton*, 455.

BOTTOMRY.

(*Presumed necessity.*) Before taking a bottomry bond from the master of a vessel, a party is bound to use reasonable diligence in inquiring whether the wants of the vessel can be supplied by the personal credit of the owner, and for want of such diligence (in a case where the sufficiency of the personal credit might very easily have been ascertained) a bond was held void, on appeal, reversing the judgment of the Court below.—*Heathorn v. Darling*, 5.

CONFLICT OF LAWS.—See ALIEN.

COSTS.

(*Probable cause of suit.*) Where the Court below had pronounced for the will with costs against the parties who had entered the caveat, and such parties appealed, the judicial committee, affirming the judgment generally, held, that as there was a probable cause for entering the caveat, the judgment ought to have been without costs, and made no order as to the costs of the appeal.—*Armstrong v. Huddleston*, 478.

CROWN.—See JERSEY.

FRENCH LAW.—See ALIEN.

JERSEY.

(*Mortmain—Purchase by crown.*) By the Norman law which prevails in Jersey, the owners of fiefs and lordships are entitled to fines on the death of their

tenants, and to forfeiture on their conviction for crimes, or to an indemnity for the loss of such rights upon the amortisement of the lands in such fiefs by conveyance to a corporation sole or aggregate.

Held, on a suit brought on a demise of the crown by the lord of a fief against the governor of the island, in respect of lands which had come by exchange into the possession of the crown, that an indemnity was payable by the crown in respect of such lands.—*Thornton v. Robin*, 439.

MARRIAGE.

1. (*Dissolution for affinity—Pendency of suit.*) By the act 5 & 6 Will. 4, c. 54, s. 1, it is provided, "that all marriages which shall have been celebrated before the passing of the act by persons within the prohibited degrees of affinity shall not thereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of the act." The act passed on the 31st of August: Held, that a citation served on the 24th of that month, returnable in three days, but on which no appearance was put in till the 9th of September. being the first Court day after service, was sufficient to constitute a suit depending within the meaning of the act.—*Sherwood v. Ray*, 353.
2. (*Dissolution of—Interest requisite to support a suit.*) The liability of a father under the poor laws to support the children of his daughters, supposing them to be legitimate, was held sufficient to entitle the father to institute a suit in the Ecclesiastical Court for the avoidance of his daughter's marriage.—*Ibid*.

MORTMAIN.—See JERSEY.

PENDENCY OF SUIT.—See MARRIAGE, 1.

PRACTICE.

1. (*Mode of relief.*) On an order dismissing a petition for the discharge of a receiver, the Court below engrafted certain directions asked for by the defendants and supported by their affidavits in opposition to the motion: Held, that such addition was irregular and the order was accordingly reversed, and an order made simply for the discharge of the receiver.—*Palmer v. Barrett*, 415.
2. (*Restoration of appeal.*) Where two appeals had been presented in the same cause, which appeals had been consolidated by an order of the Court below, and the respondent had afterwards obtained an order to dismiss the appeal against the earlier order, as being too late: such appeal was on motion of the appellant restored.—*Chowdry v. Mullick*, 404.

And see ATTORNEY.

TRINIDAD.

(*Administrative offices.*) The offices of depositario general and albacea dativo, corresponding nearly to those of accountant general and official assignee with us, are distinct offices, and the security given for due performance of the former, was held not available for defaults made in the latter.—*Davidson v. Johnson*, 409.

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ABSTRACT OF THE PUBLIC GENERAL STATUTES.

(3 & 4 VICTORIA.)

CAP. 1. An Act for exhibiting a Bill in this present Parliament, for naturalizing His Serene Highness Prince Albert of Saxe Coburg and Gotha.

[24th January, 1840.]

CAP. 2. An Act for the Naturalization of His Serene Highness Prince Albert of Saxe Coburg and Gotha.

[27th February, 1840.]

CAP. 3. An Act for enabling Her Majesty to grant an Annuity to His Serene Highness Prince Albert of Saxe Coburg and Gotha.

[7th February, 1840.]

CAP. 4. An Act to apply the Sum of Two Millions to the Service of the Year One Thousand Eight Hundred and Forty.

[24th February, 1840.]

CAP. 5. An Act to repeal so much of an Act passed in the Thirteenth Year of the Reign of His Majesty King George the Second, intituled "An Act to restrain and prevent the excessive Increase of Horse Races, and for amending an Act made in the last Session of Parliament, intituled 'An Act for the more effectual preventing excessive and deceitful Gaming,'" as related to the subject of Horse Racing.

[23rd March, 1840.]

CAP. 6. An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters.

[3rd April, 1840.]

CAP. 7. An Act to apply the Sum of Eight Millions out of the Consolidated Fund to the Service of the Year One Thousand Eight Hundred and Forty.

[3rd April, 1840.]

CAP. 8. An Act for the Regulation of Her Majesty's Royal Marine Forces while on Shore.

[3rd April, 1840.]

CAP. 9. An Act to give summary Protection to Persons employed in the Publication of Parliamentary Papers.

[14th April, 1840.]

S. 1. Persons who now are or hereafter shall be defendants in any criminal proceedings commenced or prosecuted on account of the publication of any report paper, votes, or proceedings of either house of parliament, by them or their servants, by or under the authority of either house of parliament, may bring before the court or a judge, giving twenty-four hours' notice of their intention to do so, a certificate of the lord chancellor or lord keeper, or of the speaker, or the clerk of the parliaments, or of the house of commons, that the report, &c. was published by order or under the authority of the house, with an affidavit verifying such certificate; and the court or a judge shall thereupon immediately stay the proceedings, and the same, and every writ or process issued thereon, shall be put an end to and superseded by virtue of this act.

S. 2. In case of any proceeding in respect of the publication of any copy of any such report, &c., the defendant may, at any stage of the proceedings, lay before the court or judge such report, &c., and such copy, with an affidavit verifying the report, &c., and the copy, and the court or judge shall immediately stay the proceedings, &c.

S. 3. In any proceeding for printing any extract or abstract from such report, &c., the defendant may give in evidence, under the general issue, such

report, &c. and show that the extract or abstract was published *bonâ fide* or without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered.

S. 4. Nothing herein contained to be construed directly or indirectly to affect the privilege of parliament.

CAP. 10. An Act to authorize the issue of Exchequer Bills for Public Works and Fisheries, and Employment of the Poor. [14th April, 1840.]

CAP. 11. An Act to settle an Annuity on Lord Seaton and the Two next surviving Heirs Male of the Body of the said Lord Seaton, to whom the title of Lord Seaton shall descend, in consideration of his important Services. [19th May, 1840.]

CAP. 12. An Act for raising the Sum of Eleven Millions by Exchequer Bills, for the Service of the Year One Thousand Eight Hundred and Forty.

[19th May, 1840.]

CAP. 13. An Act to amend an Act of the First and Second Years of the Reign of Her present Majesty, to abolish Composition for Tithes in Ireland, and to substitute Rent Charges in lieu thereof. [19th May, 1840.]

CAP. 14. An Act to continue for One Year, and to the End of the then present Session or Parliament, the Acts for the Relief of Insolvent Debtors in Ireland.

[19th May, 1840.]

CAP. 15. An Act further to explain and amend the Acts for the Commutation of Tithes in England and Wales. [4th June, 1840.]

S. 1. Empowers the commissioners, by declaration in writing under their hands and seal, to declare lands discharged from tithes in certain cases, after confirmation of the award or agreement for gross rent-charge; the day to be fixed for commencement of the rent-charge to be the day on which any existing composition shall determine, or the 1st of January, April, July, or October, before or after the date of the agreement or award; intermediate payments made between such day and the date of the first payment of the rent-charge to be deducted.

S. 2. Leases of tithes granted before the 25th March, and to determine by the 1st January next, not to be avoided by this act.

S. 3. Notice of declaration to be published in the county newspapers within twenty-one days after its date, at the expiration of which time the provisions of the recited acts shall be applicable to the new rent-charge from the period fixed by the declaration.

S. 4. Provision for the land-owner's paying an estimated proportion of the rent-charge in exoneration of the security.

S. 5. Certificate of the commissioners, or an office copy of it, to be evidence of the right to recover or retain the amount or excess in payment made by the land-owner or his tenant.

S. 6. Provision for tenant paying, in the place of his landlord, an estimated proportion of the rent-charge in exoneration of the security.

S. Provision for recovery of such rent-charge from persons giving security for the same.

S. 8. Remedy for the land-owner against whom execution has issued: power to obtain a summons before a judge, for taking accounts between the person giving security and the land-owners liable to contribute to it: no security to be available against any lands for more than two years' payment or arrear, unless the commissioners shall by endowment have enlarged the period for not exceeding twelve months.

S. 9. If the security be insufficient, the arrears may be recovered as if they accrued subsequent to the confirmation of an appointment.

S. 10. Securities taken under this act to be free of stamp duty.

S. 11. The powers of the commissioners, under 2 & 3 Vict. c. 62, s. 10, to fix the sum to be paid after determination of a composition, may be exercised at any time before confirmation of an apportionment, by a supplemental award, for the intervening time before the commencement of the rent-charge.

S. 12. The parties, the lands, and the proportionate amount to be paid by each party, to be specified in the instrument fixing such sum, or in the instrument of apportionment made in pursuance thereof.

S. 13. Power to commissioners, by supplemental award, to exercise the powers given by the 2 & 3 Vict. c. 62, s. 20, as to fixing the period for commencement of the rent-charge.

S. 14. Extension of the powers given by the 2 & 3 Vict. c. 62, s. 11, to substitute a fixed instead of a contingent rent-charge.

S. 15. Extension of powers given by 2 & 3 Vict. c. 62, s. 13, in respect of tithes and common lands.

S. 16. Commissioners to give same notice of their intention to proceed by supplemental award as is required in case of an original award.

S. 17. Extension of the power given by 2 & 3 Vict. c. 62, s. 21, for conveyance of lands to trustees and feoffees for parochial purposes.

S. 18. Power to the parties to a parochial agreement, and to the commissioners in case of an award, to declare the amount of the extraordinary charge to be payable in respect of hop grounds and market gardens, &c. No extraordinary charge to be made on them for the first year of their being cultivated as such, and only half for the second year.

S. 19. The amount of extraordinary rent-charge need not be distinguished on separate lands in the apportionment.

S. 20. Half-yearly payments of rent-charge to be regulated by the averages declared under the 6 & 7 Will. 4, c. 71, s. 67.

S. 21. Unless a majority in value of the owners of lands request its omission, the instrument of apportionment shall distinguish the amount of rent-charge payable in respect of each close: but this provision not to apply to cases in which valuers are already appointed.

S. 22. Provision for recovering back by occupier, out of his rent or renewal of fines, of expenses chargeable under these acts.

S. 23. Power to charge expenses of commutation, in certain cases, on renewal fines, &c.

S. 24. Provision for examination of witnesses, and production and discovery of books and documents relating to commutation.

S. 25. Gardens, lawns, or the like, of small extent, may be exempted from rent-charge.

S. 26. The commissioners to cause a new apportionment to be made in cases where the apportionment shall have included tenements from which no tithe has been taken for seven years previous to Christmas 1835.

S. 27. Provision for costs of such new apportionment.

S. 28. Commissioners may adjudicate on parochial boundaries, on the application of two-thirds in number and value of the land-owners of any one parish, &c. whose boundary is in question: provision for notice to all the parishes, &c. adjoining to the boundary. Proceedings to be stayed on the application of two-thirds in number and value of the land-owners of any other of the parishes, &c.

S. 29. This act to taken to be a part of 6 & 7 Will. 4, c. 67; 7 Will. 4 & 1 Vict. c. 69, 1 & 2 Vict. c. 64, and 2 & 3 Vict. c. 62. Interpretation clause.

S. 30. Act may be amended or repealed this session.

CAP. 16. An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and for extending the Time limited for those purposes respectively, until the Twenty-fifth Day of March, One Thousand Eight Hundred and Forty-one: and for the Relief of Clerks to Attornies and Solicitors in certain Cases. [19th June, 1840.]

CAP. 17. An Act for granting to her Majesty Duties of Customs, Excise, and Assessed Taxes. [19th June, 1840.]

CAP. 18. An Act to discontinue the Excise Survey on Tobacco, and provide other Regulations in lieu thereof. [3rd July, 1840.]

CAP. 19. An Act for granting to Her Majesty an additional Duty of Customs on Timber. [3rd July, 1840.]

CAP. 20. An Act to amend an Act passed in the First Year of the Reign of His late Majesty King George the First, intituled "An Act for rendering more effectual Her late Majesty's gracious Intention for the Augmentation of the Maintenance of the Poor Clergy;" and to render Valid certain Agreements which been made in pursuance of the said Act; and for other Purposes. [3rd July, 1840.]

CAP. 21. An Act to extend to the British Colonies in the West Indies an Act passed in the Fifth and Sixth Years of His late Majesty King William the Fourth, for regulating the Carriage of Passengers in Merchant Vessels. [3rd July, 1840.]

CAP. 22. An Act to impose upon Broad or Spread Glass the same Duties of Excise that are payable upon German Sheet Glass. [3rd July, 1840.]

CAP. 23. An Act for granting to Her Majesty, until the Fifth Day of July, One Thousand Eight Hundred and Forty-one, certain Duties upon Sugar imported into the United Kingdom, for the Service of the Year One Thousand Eight Hundred and Forty. [3rd July, 1840.]

CAP. 24. An Act to repeal Part of an Act of the Forty-third Year of the Reign of Queen Elizabeth, intituled "An Act to avoid trifling and frivolous Suits in Law in Her Majesty's Courts in Westminster;" and of an Act of the Twenty-second and Twenty-third Years of the Reign of King Charles the Second, intituled "An Act for laying Impositions on Proceedings at Law;" and to make further Provisions in lieu thereof. [3rd July, 1840.]

S. 1. Repeals the 43 Eliz. c. 6, s. 2, and the 22 & 23 Car. 2, c. 9, s. 136.

S. 2. If the plaintiff in any action of trespass or on the case, brought or to be brought in any of the Courts at Westminster, in the Common Pleas at Lancaster, or the Common Pleas at Durham, shall recover by verdict less than 40s., he shall not be entitled to any costs, whether the verdict be given on trial or by default, unless the judge, &c. shall immediately afterwards certify on the record, writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages, or that the trespass or grievance was wilful or malicious.

S. 3. Nothing herein to deprive any plaintiff of costs in any action for a trespass over any lands, &c., or for entering into any premises in respect of which notice to trespass shall have been previously received upon or left at the last known place of abode of the defendant.

CAP. 25. An Act to amend the Act for the better ordering of Prisons. [3rd July, 1840.]

S. 1. So much of the 2 & 3 Vict. c. 56, as renders the rules and regulations therein prescribed applicable to debtors, repealed.

S. 2. Regulations respecting the management and classification of debtors and persons convicted of misdemeanors.

S. 3. Act may be amended or repealed this session.

CAP. 26. An Act to remove Doubts as to the Competency of Persons, being rated Inhabitants of any Parish, to give Evidence in certain Cases. [3rd July, 1840.]

S. 1. After the passing of this act, no person called as a witness on any trial shall be disabled from giving evidence by reason of his being, as the inhabitant of any parish or township, rated or assessed, or liable to be rated or assessed, to the poor, church, or highway rate, or for any other purpose.

S. 2. No officer in any parish, &c., or person rated or assessed or liable to be rated or assessed as aforesaid, shall be disabled from giving evidence on any trial, appeal, or other proceeding, by reason of his being a party to the proceeding, or liable to costs, when he shall be only a nominal party, and only liable to contribute to costs in common with the other rate-payers.

CAP. 27. An Act to continue to the First Day of August, One Thousand Eight Hundred and Forty-three, and from thence to the End of the then next Session of Parliament, Two Acts relating to the Removal of Poor Persons born in Scotland and Ireland, and chargeable to Parishes in England. [3rd July, 1840.]

EVENTS OF THE QUARTER.

THE most important question, of a legal or forensic character, that has attracted the public attention within the last three months, is one regarding Mr. Charles Phillips's defence of Courvoisier. The criminal, it seems, had made a full confession of his guilt the night before this distinguished advocate addressed the jury for the defence, and the feelings or prejudices of society have received a shock, not at all favourable to the general estimate of the profession, from the fervour which he notwithstanding contrived to infuse into his appeal. We took occasion very recently to vindicate the privileges of the bar,¹ and we deem it quite unnecessary to prove again that a counsel is bound to see the due forms of law and the strict rules of evidence observed, whatever opinion he may chance to entertain as an individual of the moral guilt of the party or the actual merits of the case. If it was Mr. Phillips's duty to throw up his brief, it was his duty also to appear as a witness against his client; for we presume it is not intended to dispense with proof altogether in such contingencies; and admitting that a counsel is to take this line in the case of a confession, what is he to do when he has simply formed a decided opinion against the prisoner? In Patch's case, for example, it was inferred from the position of the parties, that the man who fired the pistol must have been left-handed. The prisoner was asked at the consultation, whether he was left-handed, and he answered, without hesitation, that he was not; but when told to hold up his hand in the dock, he involuntarily raised the left hand, and the movement was seen distinctly by one of the very eminent counsel (now one of our best criminal judges) who defended him, and who has often declared since, that, from that moment, his own mind was perfectly made up; yet whoever dreamed of blaming him for not abandoning the murderer to his fate? At the same time, we think Mr. Phillips went too far. There was no occasion for insinuations against the maid-servants; nor was it in good taste, to say the least of it, to attempt to work upon the timid consciences of the jurymen, by holding out the apprehension of a never-dying omnipresent feeling of remorse. He had only to go to a step farther, and introduce the melodramatic absurdities of the French criminal courts, where it is not all unusual for an advocate to stand up and embrace a client of the Vautrin or Robert Macaire class, by way of conveying an impression of his innocence. This, we are credibly informed, has been done by no less a person than M. Charles Ledru, subsequently to a confession. Were we to adopt the practice, our briefs might be indorsed thus:—

| | |
|-----------------------------|-----------|
| Brief for the prisoner..... | 2 guineas |
| Consultation | 1 guinea |
| Embracing | 1 guinea. |

The Administration of Justice in Equity Bill has made more progress than was anticipated, and there seems some prospect of its passing this session. Under the recommendation of the Lords' Committee, the clauses relating to the Judicial Committee have been omitted; and one of the proposed vice-chancellorships is to cease with the life of the first occupant, Lord Lyndhurst and other weighty authorities being of opinion that much of the present accumulation of arrears is attributable to temporary causes.

The bills regarding copyhold and manorial rights are much in the same condition; and Mr. Serjeant Talfourd, with the best possible intentions, has found it impossible to get on with his Copyright Bill.

A useful though rather clumsily expressed statute, has been passed for depriving plaintiffs in frivolous suits of costs; but on the whole there has seldom been a session less productive than that which is on the eve of concluding as we write.

Amongst the attempts at legislation—and we trust it will prove nothing more—which we feel inclined to single out for comment, is a bill introduced by Mr. W. Miles to give justices at sessions jurisdiction over cases of seduction and breaches of promises of marriage, i. e. to the extent of 30*l.*, which is the maximum of damages to be awarded by them. A Devonshire farmer, pathetically bemoaning the seduction of a favourite daughter to a friend of ours, exclaimed—"I wouldn't ha' had it happen for five pounds." We hope Mr. Miles, a man of sense and observation, has not come to the conclusion that the majority of the agricultural population are wont to estimate their wrongs of this kind in the same manner; for in that case it would be difficult to justify the indignation with which Mr. O'Connell's alleged libel on our countrywomen was repelled. However, he was quite right in asserting that the proportion of bastard children in Ireland is small; and one main cause undoubtedly is, the habits of self-reliance in which the female peasantry, in the absence of a bastardy law, have been brought up. The change recently effected in England in this respect has not yet produced all the good that was anticipated; and it is very seldom that the bare abolition of a bad law will at once abolish the state of feeling induced by it; but this is no reason for reviving the principle in the most injurious shape it can assume. We see no particular objection to making seduction penal; but Mr. Miles holds out a direct premium to immorality when he gives the penalty to the yielding fair one or her friends.

Mr. Kelly has introduced his promised Bill for the abolition of the Punishment of Death. It is impossible to help admiring the talent and energy with which he enforces his views; but he has fallen into the usual error of the more zealous order of philanthropists, and is for pushing the principle too far. Surely rape attended with peculiar circumstances of aggravation, and the offence of setting fire to ships, should be put upon the same footing with direct attempts on human life, and be excepted from the operation of the bill.

The solicitors of the metropolis seem thoroughly resolved to effect the removal of the Courts to a more central situation, notwithstanding the indifference of the bar and the sentimental opposition of the Attorney and Solicitor General, who avowed an almost insuperable repugnance to tearing themselves from Westminster Hall and its associations. A highly respectable meeting (Mr. Teesdale in the chair) was held in May last, to consider the expediency of adopting Mr. Barry's plan for a set of courts, on a most magnificent scale, in Lincoln's Inn Fields. The chief speaker was Mr. Vizard, who certainly made out a strong case for the removal. He was ably seconded by Mr. Freshfield, Mr. Shadwell, Mr. R. White, Mr. Thos. Clarke, and Mr. Amery, who forcibly urged the inconvenience experienced by solicitors residing in the city. On the motion of Mr. Metcalfe, seconded by Mr. Martineau, it was resolved that the Lord Chancellor should be requested to present their petition to the House of Lords, and the Attorney and Solicitor General to the House of Commons. The reason of the supineness of the bar may be traced to the leaders, who like to be near the House of Commons.

LIST OF NEW PUBLICATIONS.

Commentaries on the Laws of England in the order and compiled from the Text of Blackstone, and embracing the New Statutes and Alterations to the Present Time. By John Bethune Bayly, of the Middle Temple, Esq. Royal 8vo. price 28s. boards.

A Selection of Leading Cases on various branches of the Law; with Notes. Vol. II. Part II. By John Wm. Smith, Esq. of the Inner Temple, Barrister at Law. Royal 8vo. price 10s. boards.

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THE LAW MAGAZINE.

ART. I.—REMINISCENCES OF THE FRENCH BAR.

Souvenirs de M. Berryer, Doyen des Avocats de Paris, de 1774 à 1838. Paris. 1839.

THIS is one of the most curious and amusing publications we ever remember to have read. The author, M. Berryer, the father of the celebrated orator of that name, entered the profession of the law in 1774, and is still actively engaged in it. He was the first advocate who condescended to plead before the revolutionary tribunals, and he was concerned more or less in almost all the causes of consequence which came before them. His reminiscences consequently comprise the ancient regime, the transition period, and the established order of things; and they are narrated fully and frankly, in clear, easy, familiar language, with some of the caution taught by experience, but with none of the garrulity of age.

They have, moreover, a merit which few French cotemporary memoirs possess, that of authenticity. M. Berryer is not, like Madame de Crequy, a supposititious personage, but may be seen and consulted any morning at his chambers, Rue Louis le Grand, by any one who may be sceptical as to his identity.

He begins by describing the courts of law as they existed when he first entered on his noviciate. At the head stood the parliament of Paris, an august and erudite body, justly venerated for the fearlessness with which on many trying occasions they had refused to register the arbitrary edicts of the crown. They were divided into chambers, and held their sittings in the Palais de Justice, a building which rivals Westminster Hall in the richness and variety of its associations, though far inferior in architectural magnificence. Around them were clustered a number of inferior jurisdictions, closely resembling those of which the ancient judicial system of England, and,

indeed, of every country with feudal institutions, was made up. There existed provincial parliaments and other local tribunals, it is true; for the administration of justice in France was never centralized; but what with appellate and exceptional jurisdiction, the concourse of suitors to the capital was immense. A countryman inquired of a lawyer whom he saw about to ascend the grand staircase of the Palace of Justice with his bag of papers, what that great building was for. He was told it was a mill. "So I see now," was the reply, "and I might have guessed as much from the asses loaded with bags."

It is a remarkable circumstance that a great majority of the public buildings of London are of comparatively recent date, those which they replaced having been destroyed by fire. The same fate has befallen the public buildings of Paris; and M. Berryer states that the immense vaulted galleries which, from the shops established in them, had procured the temple of justice the name of the Palais Marchand, were swept away about 1774, by a conflagration not less violent than that which the year before had consumed the Hotel Dieu.

He also duly commemorates the Grand Châtelet, the seat of sundry metropolitan jurisdictions, and relates some curious circumstances regarding the ancient debtors' prisons, the Fort-l'Évêque, and the Conciergerie.

In the former was confined no less a person than Maximilian, the reigning Duke of Deux-Ponts, afterwards king of Bavaria. In the latter, M. Berryer tells us, a rich English lord, Lord Mazareen, was detained during many years for a large sum due on bills of exchange, which, though with ample means, he obstinately refused to pay on the ground of his having been cheated out of them at play. He lived at the rate of more than a hundred thousand francs a year, kept open table, had his servants and carriages, and paid for boxes at all the theatres for his mistresses.

A second edition of Lord Mazareen appeared more recently in the person of an American, Mr. Swan, who was confined twenty-two years in Saint Pelagie. This gentleman was in the habit of publishing memorials against his detaining creditors, which he invariably commenced by stating that he possessed more than five millions (francs) in the United States;

that it would be easy for him to pay twenty times the amount of the claim, but that it was unjust and his conscience did not permit him to purchase his liberty by a dastardly sacrifice. Swan was nearly fifty-two years of age when he was arrested: he was seventy-four at the period of his release, which he owed to the revolution of July. He died two months afterwards.

The number of procureurs attached to the parliament of Paris at this time (1774) was about four hundred, all enjoying a competence, and about a tenth making large fortunes. There were about six hundred advocates upon the roll; one half of whom, according to M. Berryer's calculation, had caused themselves to be inscribed for the sake of the rank.

Madame de Crequy (or rather the person who usurps her name) states that, to the best of her information, there was only a single instance of a member of the *noblesse de l'épée* becoming a member of the *noblesse de la robe*, in other words, accepting an appointment in the magistracy; but this did not prevent the judicial body from holding a high place in general opinion, or occasionally demeaning themselves with superciliousness towards the bar. Their places were, in many instances, hereditary, and often objects of sale, yet the requisite qualifications were hardly ever wanting, and no body of men was more distinguished by learning and integrity.

The mode of becoming an advocate, or (as we should say) being called to the bar, was much the same as at present: the candidate was to attend certain lectures or courses, undergo certain examinations, and come provided with certain certificates of fitness; but the line of demarcation was not strictly drawn, and M. Berryer himself commenced his studies in the office of a procureur—a close approximation to an attorney, so far as suits or actions are concerned. An office of this kind was, in M. Berryer's opinion, a much fitter school than the chambers of an advocate in which the rising generation receive their training, because it brought the student acquainted with a greater number of practical details. The forms were then embarrassing and multiplied; to complicate them by incidents was an art in which a Parisian practitioner made it his ambition to excel. Many therefore were eternal; they passed (like an English Chancery suit) from the procureur who had begun

them to his successor, often even to several generations of successors, like a disposable patrimony; these formed the *fonds d'étude*, and on the sale of the business were duly considered in the price.

M. Berryer soon acquired the full confidence of his superior by his diligence, and attributes to his early habits of industry the taste for a sedentary life and the power of unremitting application which he retains still. An active clerk in these days, he says, began work at six, paused for a few minutes to snatch a hasty breakfast at nine, was allowed an hour for dinner (from two to three), and returned to his office till nine in the evening. All the theatres closed between nine and ten, and no sort of evening amusement was open to him.

M. Berryer's labours in this walk were of short duration, for in 1778 he was inscribed on the roll of advocates, though not permitted to take the oath till 1780, in consequence of a rule (similar to one established by the English laws of court) declaring a clerkship incompatible with the higher species of noviciate. The students, however, were permitted to eke out their incomes by drawing pleadings and other documents, it being simply necessary to procure the signature of a regular advocate to authenticate them; and here again a strong resemblance to the ancient state of the profession in this country is discernible; for our special pleaders originally consisted exclusively of students, and their growth into a distinct profession is a palpable incroachment. M. Berryer availed himself of this privilege and avows that he could not otherwise have maintained himself in the style required by the rules of the order and the fashion of the day. The student (*stagiaire*) could not even appear in the streets without the prescribed dress—black dress-coat, long hair in ties, and a cocked hat under the left arm; and we are by no means sure that M. Berryer is in error when he thinks that this costume acted as a salutary check. A high sense of honour was sedulously inculcated, and their emulation was excited by anecdotes of the advocates who had established a traditional reputation for talent, independence, and integrity. The following were favourites:

An advocate, finding himself during the vacation near the country house of a president, deemed it his duty to pay his

respects to him. The president was in his library arranging his books; scarcely deigning to notice the arrival of the advocate, he came down from his steps and seated himself with dignity in his arm-chair, neither offering a seat to his visitor nor inviting him to take one. Without showing any annoyance at the stupid ill-breeding of the president, the advocate drew forward another arm-chair, seated himself in it, put on his hat and began a conversation on the ordinary topics of the day. The president, shocked by such a liberty, inquired by way of reproof:

“What was the time, sir, when advocates would not have dared to seat themselves or put on their hats before a judge, without having first asked and obtained permission?”

“Mr. President,” replied the advocate, “it was when advocates had neither heads nor tails (*ni cul ni tête*.)”

Le Maitre, a celebrated advocate of the age preceding, used to amuse himself during the vacation by pleading causes for the peasantry. On one occasion he made such an impression, that the provincial magistrate told him he did wrong to waste his splendid abilities on trifling matters in the provinces: “Go to Paris, you will there find a fitting field for them: you will become the rival of the famous Le Maitre.”

On another occasion, having introduced several Latin quotations with the view of embarrassing the judge, he provoked a curious addition to the judgment: “We fine the advocate a crown for having addressed us in a language which we do not understand.”

The moral of the next story is that young gentlemen should be cautious in indulging their personal vanity.

An advocate, by way of accompaniment to his speech, was flourishing about his hand in such a manner as to show off a magnificent diamond ring. He was young, good-looking, and pleading for a lady of quality, who had demanded a separation from her liege lord. The husband, who happened to be present, interrupted him in the middle of a period, and, turning to the magistrates, exclaimed: “My lords, you will appreciate the zeal which M. — is displaying against me, and above all the purity of the grounds on which he relies, when you are informed that the diamond ring he wears is the very one which I placed on my wife’s finger on the day of that union

she is so anxious to dissolve." The court, says M. Berryer, rose immediately; the cause was lost, and the advocate never had another. What adds to the point of the catastrophe, it does not appear that the husband's statement had the slightest foundation in fact, or that he entertained any suspicion of the sort.

M. Berryer gives clever graphic sketches of the leading lawyers of the day, but these possess little interest for English readers, to whom the very names of most of them must necessarily be unknown. Some specific facts, however, are communicated regarding Gerbier, the Erskine of the French bar when M. Berryer first joined it.

Gerbier had a fine Roman head, with a voice of great compass, and his action was peculiarly impressive. He consequently excelled in passages where a dramatic effect was to be produced; and these may almost always be introduced with little risk of failure in France. Thus, in his defence of the brothers Du Queyssat, tried for a cowardly murder, he introduced the chapel of the Palatinate, in which the sword of one of them, a gallant soldier, had been suspended by the express command of his general, and demanded, if this could be the same sword which had been basely turned against the murdered man?

The peroration of his speech for the Bishop of Noyon, prosecuted by his own chapter, affords another example of this style:

"It once fell to the lot of Constantine the Great to receive, at his imperial levee, several deputies from the clergy, who came to denounce the shamefully irreligious conduct of the primate, their chief. To these virulent accusations, the prince, after having listened to them with the most conscientious attention, made answer: 'My duty and your's are to place no faith in suspicions which the impious may be anxious to raise against the sacred character of the primate; so that—to suppose an impossibility—if I surprised him in the very act of sin, I would cover him with my purple.'

"It is now for you, my lords, to cover by your decree the sacred person of the Bishop of Noyon."

The gay world of Paris, particularly the female part of it, believed that Gerbier could win any cause he chose; and when the Marquise de Seigneley's suit against her husband

for a separation was supposed desperate, the alleged grounds having been declared nugatory, the Duchess de Polignac flew to his study, leading the fair complainant by the hand, and begged as the highest favour that he would become her advocate. In vain did Gerbier protest that a solemn judgment of the Grand Chamber on a question of fact struck him as unassailable. They continued their entreaties, and at length threw themselves at his feet, upon which Gerbier had no alternative but to comply.

Amongst other topics of accusation against the Marquis, was a scene which had taken place in a shop. Instead of offering the Marchioness his arm on alighting from the carriage, he had twisted her hand in such a manner as to make her scream with pain. In addition to this act of brutality, which had excited the indignation of numerous spectators, the husband on entering the shop had made unmannerly remarks on his wife's purchases. Gerbier, with inimitable tact, made the most of the intolerable nature of such conduct towards a lady of honour in the service of the Queen of France; and the demand of the Marchioness was acceded to.

Gerbier, aware probably of his weak point, was wont to get two of the best lawyers to discuss the merits of his great causes in his presence. He then chose his topics, and formed his plan, but trusted to the inspiration of the moment for the language and the imagery. It is sagely remarked by M. Berryer, that such a constant series of successes is invariably the result of complete preparation. That the required aid might be constantly at hand, he had always an advocate or two, content to play the part of crammers, in his cabinet; but whether he remunerated them by a share of the profits, or by recommending them to his clients (like some leaders of the English bar, who get relieved of much of the drudgery of the profession in the same manner), remains a doubt.

Gerbier, however, possessed both delicacy and generosity, as was shown by his conduct to M. Berryer, who had been retained to conduct a petty cause for the Duchess of Mazarin, which it was deemed beneath the dignity of her regular counsel to undertake. But it was one in which she took a warm personal interest, and she had expressed a wish that a consultation should take place between Gerbier and M.

Berryer in her presence. The scene was the Duchess's dressing-room, where she stood in state, surrounded with her waiting-women. Gerbier's first words, after the ordinary salutation, were, "Good morning, my young colleague, I have heard of you at the Palais;" then turning to the Duchess, "Madame, in this young advocate you have an organ worthy of you. It is the clearest and purest that has been heard at the Palais this many a year."

Berryer explains the course it is his intention to adopt, and Gerbier expresses his entire concurrence; but as they are descending the staircase he stopped short, and said, "My young friend, I am delighted at having heard you; the Duchess's cause is in good hands. But take it in good part if I make one slight observation. Such an argument (mentioning it) might call forth such a reply, which would be embarrassing: I advise you to suppress it." The hint was as valuable as it was delicately given: the Duchess succeeded, and M. Berryer thenceforth had all the business of the establishment which was not important enough for Gerbier.

During the period of his noviciate, M. Berryer was employed in a matter which affords a curious illustration of the manners of the times.

The son of a judge, member of the Parliament of Rouen, had married his mother's maid, a woman of strict virtue, to whom he was warmly and conscientiously attached. The father was absent at the time, and was not made aware of what had taken place till after the birth of two children. Though the mother had connived at the union, the father's consent was necessary to its legality, and M. du B. (the judge) insisted that it should be annulled without delay. The son refused, and a *lettre de cachet* was obtained for his imprisonment in the royal prison of Rouen. Here he was visited by the father, who treated him with such roughness and severity, that the moment he was left alone he threw himself from the window of the tower, and fell almost at the father's feet, with a broken leg and a concussion of the brain. The accident was not fatal, and as soon as he was strong enough to leave the prison, he was released. He repaired to England, where his wife and children had taken refuge, but his slender means being soon exhausted, they must have perished of hunger but

for the generosity of a French jeweller, named Tubœuf, who afforded them occasional relief in the shape of loans. Tubœuf, whose business called him frequently to France, had several interviews with the father on the subject, but the utmost he could ever obtain from him was a guarantee for repayment conditional on the obedience of the son. A correspondence had also taken place between the father and Tubœuf, who, relying on certain passages in the letters and the oral promise, continued his advances, which amounted in the course of four years to 30,000 francs. At the end of this period, Tubœuf came to Paris with his protégés, and commenced a suit against the father.

It was entrusted to M. Berryer, who admits that the cause struck him as better grounded in morals than in law, and the only chance of success depended on the answers to certain interrogatories to which it was proposed to subject the magistrate. An order for this purpose was obtained as a matter of course from the parliament of Paris, and, armed with it, M. Berryer set out with his client for the country-seat of M. du B., a stately old chateau, surrounded by a moat. Leaving Tubœuf in the avenue, he obtains with some difficulty a personal interview with the proprietor, who, obdurate as ever, contemptuously repudiates the claim, and expresses his firm conviction that nothing would induce his brother judges to subject a man of his rank to interrogatories. At the same time he reminds M. Berryer that he is exceeding his privilege as advocate in making this sort of personal appeal. M. Berryer replies that nothing short of his high respect for M. du B. would have tempted him to risk such a step, but that he thought a great deal of unnecessary pain might be saved to all parties by conciliation, and that, as to the supposed immunity, he held the order for the interrogatories in his hand. Startled at this unexpected intelligence, and flattered by M. Berryer's assumed deference, the judge begins to relent; M. Berryer is requested to stay to breakfast; the jeweller is called in, and at length the whole matter is amicably arranged.

This incident is a good illustration of the peculiar merits of the author, who seems to have got on full as much by tact and knowledge of the world as by learning and eloquence. The case necessarily became a leading topic of conversation in legal

circles, and no sooner was M. Berryer called to the bar than he began to reap the fruits of the credit thus acquired.

In his first cause he was so overawed by the dead silence with which his address was received, that he fainted away at the conclusion, and was first restored to consciousness by being told that judgment was given in his favour. The unusual silence of the court was owing to the clearness and musical intonations of his voice, which, he modestly adds, has always had the effect of conciliating his auditors :

"I was organised in such a manner as to receive strong sensations and impress them in my turn, without having anything colossal, nor of a very marked energy, in my person ; my soul was easily let loose in my speeches ; that is what made them listened to. Those who have the secret of the human heart will judge, after this, of all that has happened to me, of the victories I have gained in my contests at the bar, and of the bitterness of some of them. I laboured my causes with great care. I brought the greatest zeal to them. I was moreover stimulated by the recitals daily made to us of the immense fortunes to which, by the mere force of their talents, advocates, at all epochs, had arrived. In all ages of the monarchy the bar had been the nursery of the bench : the most illustrious parliamentary families had no other origin."

This must be understood merely as implying that the families in question were first raised from obscurity through the bar ; for the French bench and bar were never directly and necessarily connected as with us.

"It was customary," he adds, "to quote with emphasis and doubtless with some exaggeration, traits of the magnificence exhibited by clients towards their advocates. It was said that Gerbier, in a single cause, had received from a client beyond the seas a fee of 300,000 francs. The case of this liberal Cræsus was in truth of the highest importance. He had been governor, for France, of a colony, where he was accused of having committed enormous exactions. The fate of the unhappy Count de Lally might well startle him. The talent of Gerbier preserved to him much more than the value of his extorted treasures."

M. Duvaudier, an able advocate though of inferior celebrity, whom the high society of Paris received on a footing of equality, had an aged client, a woman of quality, who, in the intoxication of success at the happy termination of a suit, conceived the idea of a fee in much better taste. She repaired

first to a notary, where she caused the grant of an annuity of 4,000 francs a-year to be prepared; then to a coach-maker's, where she ordered a handsome carriage; to a horse-dealer, of whom she purchased two superb horses; lastly, to a tailor, who, by a day named, was to make complete liveries for coachman, footman, and porter.

M. Duvaudier, on the day chosen by the lady, was summoned to the Palais for another suit. At its termination he is accosted by his servant, attired in the livery, who informs him that Madame Duvaudier had given orders for the carriage to come for him. M. Duvaudier, a little surprised at the dress of his servant, decides notwithstanding on following him, expecting to learn the key to the enigma from his wife. On reaching the carriage, his surprise increases at finding the coachman similarly arrayed. The footman, on opening the door begs, in Madame D.'s name, that he will look at a paper which he will find under the cushion. This is the deed for the annuity destined to maintain the equipage.

The only tradition we have to set against these is the somewhat apocryphal one preserved in the Percy Anecdotes, of a fee of 20,000*l.* to "a lawyer who some years ago was distinguished by the epithet of the extraordinary special pleader, and was afterwards raised to the peerage," (probably Dunning) for the defence of a young lady of rank indicted for child-murder. The principal witness was a midwife, who had been forcibly carried to the lady's house blindfolded. She swore that her conductor forded a river twice: there was but one straight river between the houses, and the counsel obtained a verdict of acquittal by suggesting, that supposing the guide should have recrossed it to deceive the woman, he must have forded three times instead of two.

The same authority states that Lord Wemyss gave the Lord President Forbes an estate of 300*l.* a-year for life for pleading the cause of his son-in-law, the notorious Colonel Chartris, before the privy-council.

The fees in the Attwood case are the largest of which there is authentic evidence in modern times.

In January, 1789, the author marries the daughter of M. Gorneau, a procureur with large commercial connexions, and his business is increasing rapidly, when the Revolution

breaks out in all its fury, and every established relation is disturbed. The small share he was induced to take in it at the commencement shows how the first steps to fortune may be made or missed in times of trouble, according to the nerve, or principle, or want of principle, of the individual.

The tocsin sounded, and the inhabitants of the quarter all hurried to the church, without well knowing why. Berryer follows the crowd, and wanders with them up and down the aisles for two or three hours, at the end of which the propriety of organising a board of administration and a national guard is hinted at, but no one knew how to set about it. A plan is proposed by Berryer ; and he is instantly laid hold of by the bystanders, forced to the pulpit, and required to address the meeting. The novelty of the spectacle of a lawyer occupying the place of the priest, caught the fancy of the assembly, and induced them to listen to the orator. He explains in what manner it is necessary for them to proceed so much to their satisfaction that he is named president by acclamation. Here, therefore, the road to the highest honours or the most infamous notoriety was laid open to him : he might have been a Danton or a Robespierre ; but he modestly shrunk back, and was with difficulty induced to accept the comparatively humble post of secretary, which he surrenders soon afterwards from motives which do him the greatest credit, though the apparition of sundry heads on pikes before his windows that same evening probably accelerated his resolution.

“ My ultimate conviction has ever been, that the first quality required in whoever undertakes to merit the confidence of his sovereign, is, beyond contradiction, civil courage ; that is to say, an imperturbable firmness of soul, which braves every danger, above all, that of displeasing the authorities, or of openly discountenancing an opinion which one believes false or immoral. I had feared to express the horror which the bearers of the heads inspired—I had been compelled to keep it to myself. It was too much for my peace of mind.”

Towards the close of the year 1789 the principal tribunals were broken up, and the order of advocates was suppressed. New courts were established, and suitors were permitted to appear by deputy, so that the public gained nothing beyond

the substitution of a set of ignorant adventurers for a body of men distinguished by learning and integrity. A small proportion of the ancient bar continued the practice of their profession under its new titles, and amongst the most conspicuous was M. Berryer, who set the example by undertaking the defence of the public treasury against an Englishman named Hartley, claiming compensation for a vessel illegally captured during the American war. The Englishman's chance of success at such a period against such an adversary must have been slight, whatever the merits of his cause ; but M. Berryer attributes the failure of the claim to a memoir of his drawing, and assures us that he was thenceforth regularly employed by the treasury, and had most of the important causes brought before the new tribunals to conduct. The manner in which he was enabled to gain one of them is singular enough.

A judge of the highest order had instituted a prosecution for adultery against his wife,—the mother of two children, and her paramour,—the husband's own valet, a married man and the father of a family. The husband was sixty years of age, the wife twenty-two ; the proofs of criminality were complete, but her relations were resolved to leave no stone unturned to save her from disgrace, and a dowager marchioness was deputed by them to wait on M. Berryer. In the course of the consultation he had occasion to state that, under certain circumstances, such as those amounting to what the English law terms condonation, the judges would be justified in refusing to receive evidence of the crime, however clear. " If that be the case," exclaimed the dowager, " I do not despair : the whole household are equally anxious for the suppression, and I have little doubt that I shall be able to procure evidence of a reconciliation before the next meeting of the court."

She began by procuring a picture, representing the wife kneeling with a child in each hand at the feet of the husband, who is entreating her to rise. A servant is easily induced to place this picture in the study of the judge. The temporary guardians of the wife undertook to permit her to absent herself, and then give notice to the police. The servants engaged to facilitate her admission into the private apartments of their master. The plan succeeds to admiration. The commissary of police, attended by his clerk, arrives at an early hour to

search for the pretended fugitive: the husband comes out to speak to them in the anteroom, but when, after affording the necessary explanation, he turns round, his wife appears at the door of his own bedroom in her dressing-gown. The commissary declares that his mission is ended, and that he has nothing now to do but to make a formal declaration of the facts. The husband denounces the whole as a trick, and the commissary retorts that, independently of what they had just seen, it was well known that there were conclusive proofs of the reconciliation in his cabinet. The husband challenges him to search, and the picture is discovered and carried off in triumph by the commissary.

The official report is put into M. Berryer's hands just before the cause is called on. He informs the opposing counsel of the nature of the preliminary objection he intends making, but the intelligence is received with a smile of incredulity. The objection is made notwithstanding, and, though indignantly opposed by the husband, is admitted,—the judges probably being of opinion that they should do their colleague a service by saving him from so cruel an exposure; and we must do M. Berryer the justice of supposing that a similar conviction on his part would alone have induced him to co-operate in the scheme.

Another remarkable suit was that instituted by the journey-men carriers against their masters for the amount of a certain per-centage on their wages, retained during many years, as the masters alleged, to form a fund in case of sickness. The journeymen were represented by M. Berryer, who seems to have entertained no very exalted opinion of the justice of their claim. But at the time in question it was a crime of the highest die to be a proprietor or a capitalist; equal rights required unequal judgments: and Le Roy-Sermaise, a judge of the genuine democratic school, decided almost without hesitation for the journeymen.

This worthy was once trying a cause between two peasants regarding the property in a field. The claimant produced a deed, which had nothing to do with the question. The defendant relied on long possession exclusively. "How long?" inquired the judge. "Why, citizen president, from father to son, eighty or ninety years at least." "In that case, my friend,

you ought to be satisfied : each in his turn : it is now your adversary's." He ordered the claimant to be put into possession without delay.

This mode of administering justice grew more and more into fashion, and the advocate who ventured a protest was sure to bring down the vengeance of some revolutionary tribunal on his head.

M. Berryer rendered a signal service to his profession, by saving them from a tax contemplated by the government. He showed that they stood on a different footing from other professions, inasmuch as they had no right of action for their fees ; and the validity of this ground of exemption was allowed. A more fatal blow was struck at them in the shape of a law, making a certificate of civism (as it was called) an indispensable preliminary to the privilege of practising in the courts. If the application succeeded, well and good ; but if it was rejected, the fate of the applicant was sealed. M. Berryer did not choose to incur the risk : he ceased to plead in public, and procured an employment in one of the public offices for a season.

The persecutions to which he and his family were exposed may serve to show the all-pervading tyranny of mob government :

" To begin, my wife and I were compelled to go out into the street, with a table and provisions, to eat the patriotic dinner. There was no mode of avoiding this orgy, our names being inscribed over the door of our house.

" My wife was next obliged to go to the baker's in our street, to perform the duties of commissary in the distribution of bread, which my employment did not permit me to discharge, and Heaven knows to what rude trials she was exposed.

" The revolutionary committee of the section, entrusted with the extraction of saltpetre in all the cellars, having succeeded in procuring a large quantity, took a fancy to go in state and make an offering of it at the bar of the National Convention. To give more éclat to this patriotic offering, the commissioners had resolved that a citizeness, adorned with a bouquet of saltpetre *glacé*, should accompany them, and make the offering in their name in a short discourse. They had fixed on my wife to be their orator ; branches were cut in our garden, and saltpetred, so as to imitate bouquets of diamonds. My wife was obliged to follow the procession, pro-

nounce some sentences of a discourse at the bar, and receive the fraternal embrace of the president.

The newspapers of the day have recorded this scene. People would not be a little surprised now to see my name figuring in it. Assuredly it was neither with her good will nor mine that my wife, a few months after the sufferings of her lying-in accelerated by the death of Louis XVI., went in procession to the bar to protest our patriotism."

Notwithstanding these galling acts of submission, he saves himself with difficulty, and was once on the very verge of ruin through his connection with some bankers who had excited the revengeful indignation of a democratic leader.

This man, whose name was Héron, had become bankrupt, and fled to South America: he returned at the commencement of the Revolution with a bill of exchange for 150,000 francs, which he applied in turn to most of the leading houses to discount. They declined; he swore vengeance; and unluckily any scoundrel might easily keep a vow of this kind. Héron denounced every one of them; they were all thrown into prison on his accusation; and he was publicly complimented for his patriotism.

"The committee of public safety," said Couthon, "has declared that the republic was indebted to Héron for the discovery of the greatest conspirators, and notably those whom their fortune rendered most dangerous, as bankers and others."

A member added: "I declare that I never knew a better revolutionist than Héron."

M. Berryer was denounced for being in communication with the accused, but escaped through the interposition of a democrat whom he had formerly obliged. About the same time he loses a relation by one of those revolting murders *en masse* with which the revolutionary tribunals were wont to soothe the passions of the populace.

During the brief struggle maintained in behalf of a constitutional form of government by Lafayette, he was occupying Sedan with his army, and on the arrival of three deputies from the National Assembly with instructions to organise a republic, he ordered them to be lodged in the citadel. The municipal authorities, calculating on his support, sanctioned their detention; but the day following he left Sedan, and the

town council were only too happy to make their peace with the deputies, who graciously accorded them a full pardon in consideration of the circumstances. Some months afterwards, the affair was revived by the revolutionary party in the town, and the whole of the council, consisting of twenty-four members, chosen from the chief families, were condemned and executed, as traitors to the state.

The arrest of the ninety-four inhabitants of Nantes, on an equally groundless charge, is mentioned as a parallel case. These were brought up to be tried at Paris, and the mode of lodging them for the night was to thrust them pell mell one over the other into a church, or other public building, fling some food of the coarsest sort amongst them, and then leave them to their repose. Almost all perished, many by the guilotine, but more by the sufferings they thus underwent upon the road.

But perhaps the most atrocious accusation of all, was one founded on an imprudence of three English princes, the Prince of Wales (George IV.) and his brothers the Dukes of York and Clarence, who, in co-operation with the Duke of Orleans, had attempted to negotiate a loan for a large sum, to be secured on their notes of hand payable to the bearer. These were actually put into circulation, but no part of the proceeds appear to have reached their destination, and the princes, suspecting the honesty of their agents, withdrew the power of attorney under which the securities had been signed. Attention was attracted to the transaction by the roguish attempt of a French money-lender to pass off the notes as cash on three minors of rank, the Duke of Saint-Aignan, de Gevres, and Le Fleury; and all through whose hands they had passed were accused of conspiring to convey French property out of France to the detriment of the republic. Even the young Duke of Saint-Aignan, who had been cheated into taking them and prosecuted the money-lender for the fraud, with his young duchess, who never heard or could have heard of the transaction, were involved in the accusation.

At the peace of 1814 and 1815, M. Berryer was employed by the holders of these notes to the amount of two millions of francs, to procure payment or compensation of some sort. He met with a flat refusal from the English government, who said

they had nothing to do with the debts contracted by the royal family as individuals, and a personal application subsequently made to the princes proved unsuccessful. As M. Berryer's meaning is not quite clear, we shall quote his words:—

“M. l'Ambassadeur d'Angleterre à Paris a bien voulu se charger de leur supplique. Des espérances en réponse m'ont été données ; mais rien ne m'a encore prouvé qu'il ait été accordé, par les trois princes, un règlement équitable à tous les porteurs.”

No class or profession could be said to hold their lives on a sure tenure, but legal practitioners were exposed to a double danger, being often held liable for the most ordinary acts of duty, or the conduct of clients over whom they had not the shadow of control. A young notary, named Martin, was talking with one of his brethren, named Gabion, at about eleven o'clock in the forenoon, when his presence was required at the revolutionary tribunal. He was simply asked whether he had received as notary a written document, which, it was alleged, had been subsequently applied to unpatriotic purposes ; he answered in the affirmative, and was instantly condemned. On his arrival at the Conciergerie, the public executioner came in to complain that his carts were not full, and Martin was lifted into one of the vacant places. The fatal procession moved forwards, and was met by M. Gabion, who recognised amongst the victims the very man with whom he had been carelessly conversing on indifferent topics only three hours before.

The day following, M. Berryer had occasion to call on M. Martin, and received the first intelligence of his cruel fate from his servants. He then went to call on a friend, who was under the hands of a barber as he entered. No sooner had he told his news, than the barber fell fainting on the floor. This man was in the habit of shaving M. Martin every morning, and that gentleman stood next upon his list of customers. Well may M. Berryer ask : “ Who could breathe under so convulsive a regime ? ”

The crisis necessarily originated many splendid acts of disinterestedness and self-devotion. The following, on the part of a member of the bar, is almost without a parallel.

M. Aved de Loizerolles was confined in the same prison with his son. The son was tried first and condemned. The morn-

ing of the execution the names of the intended victims were called over: the son was asleep; the father answered to the name, and knowingly suffered in his place. Such was the reckless haste with which the name of justice was profaned, that the pious deceit passed undiscovered; and in 1821 M. Aved de Loizerolles the younger was assigned a pension by the order of advocates.

The depreciation of the assignats gave rise to several causes of importance. M. Berryer mentions one instance in which the purchaser had agreed to give 1,200,000 francs for a property, and paid for it in assignats worth about the twentieth part of that sum, which the vendor was legally compellable to accept.

At Chartres, where he went on what we should call a special retainer, he witnessed the trial of the celebrated robbers of Orgères, 112 in number. The ordinary criminal court being too small, a church in the centre of the town was fitted up for the purpose, and every morning they were marched from their prison under a strong guard, with their chief, a red-haired giant, at their head. Their exploits and apprehension would form a capital foundation for a romance or a melodrame.

Extensive excavations had been made at a remote period in the forest of Orgères, to procure stone for the cathedral of Chartres. These were occupied by a complete colony of robbers, who kept the country for many leagues round in a constant state of alarm. They had emissaries constantly on the alert, to discover houses where articles of value were likely to be found. They then introduced themselves on some pretence or other, or forced an entrance, and when disappointed of the expected treasure, they were accustomed to seize the women, and roast the soles of their feet until they pointed out where the property was concealed. A few were apprehended from time to time, but the police had sought in vain to discover the retreat of the main body, until it was made known by an accident.

Two policemen were on the look-out in the forest, when they met a lad of about ten years old, so strangely dressed as to excite their curiosity. He complained of hunger, and gladly agreed to follow them to the nearest inn. A plentiful meal was placed before him, and his movements were mi-

nutely watched. It was observed that he pocketed every thing that seemed to strike his fancy, as a silver dish, a knife, and a corkscrew, without any attempt at concealment or showing the slightest consciousness of wrong. When questioned as to his motives, he could give no other answer than that he wished for the objects in question, and that his father daily brought such things to his mother, who did not object to them. The police were not long in coming to the conclusion, that he must be the child of some of the inhabitants of the forest, of whom they were in pursuit. A glass of wine set him talking, and they learnt that he had hitherto lived in a large subterraneous habitation, where there were a number of people besides his parents; that he had several comrades of his own age who used him ill, which induced him to run away; and that he was very unhappy, because his father and mother would not let him have every thing he wanted. They immediately determined to make use of him to discover the robbers or their den, and he was easily induced, by promises of kindness and protection, to accompany them, and point out such of his old acquaintance as they chanced to encounter in their rounds. The scheme succeeded to admiration; the robbers were obliged to repair to the market towns to dispose of their booty, and as soon as any of them were recognised by the child, they were apprehended, and confronted with some of the many persons who had suffered from their cruelty. Three young women, sisters of a rich proprietor, had been lamed for life by injuries received at their hands; and the scene, when these were brought to give evidence against the gang, is represented as agonising in the extreme. They were all included in a single sentence of condemnation; and the caverns were walled up.

The seizure of neutral vessels, in direct defiance of the law of nations, by the French privateers, brought an immense increase of business to M. Berryer. In the course of six years he conducted no less than 360 cases involving the right of capture; in most of which the complainants were defeated, through the chicanery of the directory and legislative body, who resorted to the most disreputable expedients for the purpose of creating grounds of confiscation.

At this point M. Berryer resumes his sketches of the bar.

These have no points of interest for English readers, with the exception of an anecdote of Gicquel, and a trait strikingly illustrative of Napoleon.

Gicquel was severely reprimanded by the president for being late. "Mr. President," he said, "I was in the Court of Cassation defending one of your judgments." The president retorted: "The judgments of this court do not require to be defended; they can support themselves." "That is the reason, I suppose"—replied Gicquel—"why your's has just been quashed."

The trait of Napoleon relates to de la Fleutrie, who, as Napoleon was passing through Fontainebleau on his way to open the campaign of Marengo, delivered an address so much to the satisfaction of the First Consul, that he drew out his tablets, and wrote down the name of the orator. Some time afterwards, when a place in the parquet¹ of Paris was vacant, and various candidates were enumerated, Napoleon called for his Marengo tablets, found out the name of de la Fleutrie, and appointed him without another word.

A remark attributed to Louis XV. on the death of another advocate, Doucet, shows that the bar were of sufficient importance to come occasionally under the notice of royalty. This king, having inquired as usual of the courtiers who attended his levee, if they had any thing new to relate, and receiving an answer in the negative, exclaimed: "What, gentlemen, you do not know that I lost the worthiest of my subjects yesterday: M. Doucet is dead."

The regular bar, abolished in 1790, was not formally restored until 1810, but a spirit of exclusiveness was maintained amongst the acting advocates, and those who were guilty of chicanery, or in the habit of undertaking dirty causes, were stigmatised as *avocats de prison*,—a term closely assimilating them to our Old Bailey practitioners, who, prejudice apart, have never been remarkable as a body for good manners or delicacy.

One of these *avocats de prison*, retained to defend a notorious robber, when his colleagues were joking him as to the risk he ran of losing his fee, in the case of his client being

¹ The part of the court set apart for the law officers of the government.

found guilty, replied—"What is that to me; I am retained by the gang."

So close was the tie, that a watch stolen in open court from another by a novice, was restored the moment the loss was made known to the ringleader.

The most fatal blow had been struck at the respectability of the profession by Robespierre, who abolished all the law schools, in pursuance of his favourite notion, that the best securities for obedience were to be found in ignorance, superstition, and the fear of punishment. Soon after his death, however, two establishments, the Academy of Legislation and the University of Jurisprudence, were instituted under high auspices, and some of the men who do most honour to the profession at the present moment, as the Dupins, Mauguin, Teste, Hennequin, Parquin, Bourguignon, &c., are named amongst their *élèves*.

A just tribute is paid to the comprehensive views of Napoleon in the formation of the Code and the re-organization of the judicial system; but the dislike he uniformly displayed towards advocates is sufficiently accounted for by the fact, that, when (in 1804) he was canvassing for the imperial dignity, and papers were sent round for signatures, only three out of more than two hundred then inscribed upon the roll at Paris, could be induced to sign the requisition, though flattering hopes of future favour had been held out to them. In the Court of Cassation, the result, as might have been anticipated from the manner of its formation, was very different. Every member affixed his signature, except one, M. Riolz, who held out against the most pressing solicitations on the part of his colleagues, and was consequently dismissed. It is strange that Napoleon should not have felt the obvious policy of passing over this insulated instance of judicial contumacy, or, feeling it, should not have been able to subdue the exasperation which the slightest resistance to his designs on the imperial purple inspired in him. When we are told of his magnanimity in leaving a blacksmith's shed standing rather than perfect a palace at the expense of the principle of property, this dismissal of M. Riolz should be remembered.

Napoleon's enmity to the bar in general was shown in 1810

by a decree subjecting them to a species of administrative control, and his aversion to M. Berryer in particular was manifested by his refusing, though warmly pressed by Lucien Buonaparte, to make him a member of the Tribunat. The Emperor was certainly not conciliated by the author's independence in undertaking the defence of some of the generals whom he cashiered for not achieving impossibilities. Uniformly victorious during the early part of his career where he commanded in person, he made no allowance for accidents or reverses, and seriously acted on the principle mockingly attributed to the English government by Voltaire, when, in allusion to the unhappy fate of Byng, he said that the English cut off their admirals' heads *pour encourager les autres*. The generals, who, with a nation breathing vengeance and English troops opposed to them, were unable to keep their ground in Spain, were constantly obnoxious to censure; and two of these, Dupont and Vedel, being brought to a court martial, were defended by M. Berryer. The following incident is introduced to show the deadly nature of Spanish hostility.

A woman of rank, of advanced age and retired habits, was compelled to receive a French *état-major* in her chateau. Concealing her indignation, she ordered a magnificent banquet to be prepared for the officers, and did the honours of her table with the most gracious composure. At the conclusion of the repast, she rose, and proposed (what M. Berryer describes as) the most infernal toast, announcing to them that they as well as herself were on the eve of death by poison. In a few minutes this announcement was verified by the event.

Victor Hugo has borrowed or unconsciously imitated this incident in the last act of *Lucrece Borgia*.

The fearless discharge of his duties exposed M. Berryer to the persecutions of another formidable enemy in the person of Bourrienne, who had become security for a banking-house in which he was a sleeping partner, and subsequently thought proper to deny his guarantee. Exasperated at finding his conduct fully exposed and freely censured, he forced his way up to M. Berryer as they were leaving the court, and said—"If you have been a Demosthenes against me, I will be a Philip against you;" to which M. Berryer replied—"Most cer-

tainly I am far from being a Demosthenes, but happily you are still farther from being a Philip."

Bourrienne was eventually adjudged to pay the full amount of the guarantee, 800,000 francs.

The prosecution of the mayor of Antwerp sets in the strongest light Napoleon's contempt, not merely for the principles of justice but the very forms and institutions established by himself when they chanced to impede the arbitrary exertion of his will.

The mayor was a man of advanced age, irreproachable character, large fortune, and great local influence. Napoleon had treated him with marked distinction till his wife happened to have a dispute with the wife of the commissary general about a box at the theatre. The commissary warmly espoused his wife's quarrel, and by a series of calumnious reports succeeded in persuading the Emperor to order a prosecution against the mayor and three other functionaries for peculation. The cause was fixed to be tried at Brussels, but the imperial law officers having reason to suspect the inclinations of the jury, it was postponed, and a fresh jury, composed exclusively of French, was summoned. The merits, however, were so clear, or M. Berryer's speech so conclusive, that the jury, after a protracted hearing, delivered a verdict of acquittal, which was hailed as a triumph by the townspeople. Napoleon was in the middle of the campaign of Dresden when the intelligence was conveyed to him by telegraph. His indignation was excited to the highest pitch, and a missive was dispatched to Paris directing a fresh prosecution to be instituted, in which the jury were to be included if necessary. The minister of justice communicated the order to M. d'Argenson, the prefect of Antwerp, who returned for answer that the verdict rendered it impossible for him to comply. The council of state repeated the intimation, and the prefect persisted in his refusal; whereupon a *senatus-consultum*, followed for form's sake by a judgment in cessation, was procured for bringing the mayor to trial before the Assize Court of Douai. The prefect resigned rather than participate ministerially in so illegal and unconstitutional a proceeding, but the mayor was thrown into prison, and the process had recommenced, when the forced abdication of the Emperor intervened,

A chapter is devoted to the trial of Ney, but as this has been noticed in a former number,¹ we shall confine ourselves to the few details which are new to us. Ney's principal defence, so far as his personal honour was concerned, rested on the impossibility of restraining his troops; that he held out for the king as long as he could, and only yielded to necessity. It was alleged that when Louis XVIII. inquired of him what was the best means of strengthening his throne, the answer was, "One word, your majesty; let the Imperial Guard be called the Royal Guard, and your throne is indestructible." It was further stated in the course of the trial that Napoleon said to him at Auxerre, "Marshal, you have acted at Compiègne as my cruellest enemy. If Louis XVIII. had followed your advice, I should not be here." When it was proposed to rely on the fact of his having been born a Prussian, he indignantly repudiated the objection, and he was with difficulty persuaded to suffer his counsel to appeal to the 12th article of the Treaty of Paris, establishing an amnesty. It was in explanation of this article that the Marshal Prince of Eckmühl, who signed the treaty as commander-in-chief, deposed, "I had the honour to be still at the head of 8000 French bayonets; thus supported I would not have suffered the slightest reservation."

It was answered that Louis XVIII. was not a party to a treaty; and M. Berryer was suddenly interrupted by the president, and desired to refrain from pressing the topic. He persevered notwithstanding, till the Marshal exclaimed, "You see that it is a preconceived plan: I had rather not be defended at all than be defended according to the pleasure of my accusers." His friends supplicated him to allow his counsel to renew their efforts to obtain a hearing, but he remained deaf to their intreaties, returned to his prison, and quietly went to dinner; where M. Berryer found him eating with as good an appetite as if nothing had occurred. Four guards or sentinels were posted in the four corners of his room; one of them was advancing to take away a knife with which the Marshal was helping himself, when a frown, and the contemptuous expression "*quelle lâcheté!*" induced him to fall back.

¹ 9 L. M. p. 123.

Ney took leave of M. Berryer with these words, "Adieu, my dear defender, we shall meet again above." He was attended to the place of execution by the curate of Saint Sulpice. A coach was in waiting to receive them at the prison gates, and when the curate hesitated to enter first, he insisted, saying, "As for me, I am going farther than you."

In consequence of the part he took in this affair, M. Berryer was for many years under the ban of the authorities, and he complains greatly of being excluded from the Council of Discipline and other professional distinctions through their instrumentality, though repeatedly nominated by an immense majority of his brethren. In November, 1822, a royal ordinance restored the bar the free choice of their officers, and M. Berryer was then elected a member of the council without delay, which certainly looks as if his suspicions of government interference were well-grounded.

In 1825, M. Berryer paid a visit to London, and gives the following account of his reception there :—

"In 1825 I happened to be at London, where matters of importance brought me into communication with Sir Copley (now Lord Linthurst), Attorney-General, or advocate of the crown. In this capacity, Sir Copley was one of the first magistrates of the three kingdoms : he decided alone and definitively all questions of patents. This did not prevent him from continuing the practice of his original profession of plain barrister, pleading in the midst of his brethren, confounded with them on the same amphitheatre, without anything to distinguish him.

"Sir Copley had seen me at Brighton, whither I had repaired from London to obtain an audience from him. To my application he replied that he could only receive an advocate, his *confrère*, at his table ; he had the additional kindness to ask the Solicitor-General of England and other personages to meet me.

"On his return to London soon after me, Sir Copley had resumed his duties in the Court of King's Bench.

"One morning I repair to this Court, accompanied by a solicitor, with no other intention than that of being present as a looker-on at one of its sittings. The Attorney-General perceives my white head, the only one, in the crowd : he sends an officer of the Court, bearing a wand of ivory, to speak to me. The officer presses through the crowd, reaches the place where I am standing, and in a few words of English translated by my solicitor, invites me to follow

him to the bar of the amphitheatre set apart for the advocates. The bar opens. Two young advocates, in wigs *à la Louis XIV.*, come forward to introduce me. All the advocates, the Broughams and Scarletts being of the number, rise to salute me. I was dressed in a plain black surtout. My two young attendants assign me a seat between them. They keep me, during the sitting, *au courant* of what is going on. It was a bankruptcy matter under inquiry by a jury. The jury having retired to deliberate, I took a respectful leave of the advocates *en masse*.

"All the London newspapers of the day following gave a report highly flattering to both countries of this solemn reception of a Parisian advocate. I have since ascertained that it was by way of return for my having twenty years before procured the famous Erskine a reception equally warm from all my brethren at one of the sittings of the Appeal Court of Paris.

"Thus the honours heaped upon me by the bar of England were a just homage rendered to my order in my person."

Soon after his return from London, M. Berryer retired from public practice in the courts. His age now exceeded seventy, and he was annoyed by finding himself not unfrequently opposed to his eldest son, the famous orator, whose brilliant career gives occasion to numerous bursts of parental exultation, in which it is impossible to help sympathizing. Down to a very recent period, however, he has been in the habit of appearing on particular emergencies, and his chamber practice continues to this hour.

The personal narrative ends with the first volume. The second, containing an account of the most interesting causes in which he has been engaged, will form the subject of a future article.

H.

ART. II.—WARDS IN CHANCERY.

(Continued from the last Number.)

Our readers will recollect that in our last Number we inquired into many of the subjects connected with wards in chancery. The origin of the jurisdiction, the persons who may be wards, the persons who may be guardians, and the mode in which their appointment is effected, were investigated in detail. We now come to the remaining branches of the subject.

When the infant has been provided with a guardian, the next point for consideration is his maintenance. We have before had occasion to observe that maintenance may be ordered not only for wards of Court, but also for infants who are not wards of Court, upon mere petition. Lord Hardwicke stated the existence of doubts upon the subject in *Exparte Whitfield*.

“When this petition was formerly heard, I had a doubt whether the Court could upon *exparte* applications allow a maintenance for an infant, where no cause is depending, for it is at the peril of a guardian in socage what he applies for maintenance, and he will be allowed according to the discretion he has used, and therefore I directed it to stand over for precedents.”

His lordship having quoted two precedents proceeds as follows: “There may be a great convenience in applications of this kind, because it may be a sort of check upon infants with regard to their behaviour, and it may be an inducement to persons of worth to accept of the guardianship, when they have the sanction of this Court for any thing they do on account of maintenance, which otherwise would be at their own peril;¹ and likewise of use in saving the expence of a suit to an infant’s estate.”

Great care is taken to limit the number of instances in which the maintenance may be had without any bill being filed: where the property is considerable, where it is necessary in the first instance to take accounts in the Master’s office, or where the trustees have a discretion in making an allowance, a bill must be filed.² Some judges have been more scrupu-

¹ *Exparte Whitfield*, 3 Atk. 316.² *Corbet v. Tottenham*, 1 B. & B. 61.

lous in making these orders as to real estate than as to personal estate. Lord Giffard said that the result of a conference between himself and Lord Eldon was that no such order would be made as to real estate, unless the property of the infant was extremely small.¹ On the other hand the present Vice-Chancellor has disapproved of the distinction between real and personal estate,² and has made the order of reference with equal freedom respecting each kind of property. The general result of the cases appears to be that, if the property is very small, or there is a specific fund for maintenance, the order will be made upon petition.³

But whether the order is made with or without suit, the same principles seem to prevail in determining the amount to be allowed. In cases in which infants are left in the custody of their father, the father, if he is of ability, is bound to maintain them out of his own property; but if infants are removed from their father, an allowance out of his estate will be ordered, "as it is proposed that their maintenance and education should be put out of his control, it is therefore, as he may refuse to afford them more than will supply them with their bare maintenance, which the law of the country would require from every person who had the means to maintain his children, it is for that reason that the Court is to take upon itself, out of the property that those children have, instead of accumulating the income of their property for their benefit, till they should be capable of taking possession of it themselves, to apply a part of it for their maintenance and education."⁴ On the other hand if they are left to live with their father, who is not of ability to maintain them, an allowance must be provided. Even if he is of ability, an allowance must be provided in any of those cases, in which by a contract under⁵ settlement or by provision⁶ in a will, a special sum has been set apart as a fund for children's maintenance.

¹ *Exparte Molesworth*, 4 Russ. 308.

² *Exparte Starkie*, 3 Sim. 339.

³ *Exparte Mountfort*, 15 V. 445. See *Exparte Salter*, 2 Dick. 769. *Exparte Kent*, 3 Bro. C. C. 88. *Exparte Lakin*, 4 Russ. 307.

⁴ *Wellesly v. W.* 2 Bla. N. P. 133.

⁵ *Meacher v. Goring*, 2 M. & K. 491; *Storker v. S.* 2 M. & K. 491.

⁶ *Andrews v. Partington*; *Hoste v. Pratt*, 3 V. 732; 3 Bro. C. C. 60; *Wetherell v. Wilson*, 1 Keen, 83.

In whatever way the child is to be maintained, the object of the Court will be that he may be maintained according to his rank and circumstances. With this view the ability of the father to provide maintenance will be tested upon the same principles. "It is very loose," says Sir W. Grant, "to consider any particular income as enabling a father to maintain his children; to a nobleman £6000 a year would not be thought enough to exclude him from requiring some maintenance out of his children's fortunes. To a private gentleman it may be otherwise."¹ Nor is it the infant alone that the Court will consider; it will regard him as a member of the family to which he belongs, and consider whether it is not for his advantage to have such an allowance as may enable him to give some assistance in the support of his near relations; as where there are numerous brothers and sisters,² or even where there is an illegitimate brother;³ or where there⁴ is a mother in great poverty. Lord Hardwicke observed in a case of this kind, "the daughters have consented to a very reasonable offer of a part of their maintenance for the support of their mother, and although I cannot come at it by their consent, they being infants, yet I may by the liberality which the Court uses on such occasion; as has been done even in the case of a father in distressed circumstances, when a sum of money has been left to his infant son by a collateral relation, the Court has there given a liberal maintenance for his support; but then it must appear to me that the mother is in those circumstances."

The infant, having been provided with a guardian and maintenance, remains under the guardian's general care, as if the guardian were a parent. If however any difficulty arises respecting the course of his life and education, it is settled by a reference to the Court. Applications have been made on the question whether a ward should remain at Eton,⁵ whether he should be sent to college,⁵ with whom he should reside,⁶ and upon a disagreement amongst the guardians what general

¹ *Jervis v. Silk*, Coop. 53.

² *Petre v. Petre*, 3 Atk. 511.

³ *Bradshaw v. B.* 1 J. & W. 647.

⁴ *Hegsham v. H.* 1 Cox, 179.

⁵ *Hall v. H.* 3 Atk. 721. See *Beaufort v. Berty*, 1 P. W. 705.

⁶ *Anon.* 2 Ves. sen. 375; *Courtois v. Vincent*, Jac. 268.

scheme¹ should be adopted for his education and maintenance. A proposal to take a ward out of the jurisdiction is one which the Court views with the utmost jealousy,² but it is one which has been the subject of very frequent reference. The decision in *De Manneville v. De Manneville* was peculiarly strong, as it prevented the father from taking his child to his own country. In another case, in which the father was an Englishman, appointed to an office in a foreign country, he was allowed on his departure for that country to take his children. But he was obliged in the first instance to give "his undertaking to bring them or such of them as should be living back with him; and he was half-yearly to transmit, properly vouched, to be laid before the Court, the plan of tuition and education for each of the infants actually adopted and in practice at the time of such half-yearly returns, specifying particularly where and with whom they resided."³ In a more recent case⁴ an infant, a native of Ireland, was allowed to go to the university of Dublin, in order that he might be near to the residence of his father, who was in very bad health. It was ordered that the fact of his continuing at the university should be from time to time verified by affidavit. Upon another⁵ recent application for leave to take wards abroad, the state of their health, the opinions of medical advisers, and the probable effects of different climates, became the subject of careful consideration; and the Court ultimately determined that the permanent residence of the wards in places beyond the limits of jurisdiction could not be permitted. In all these matters the Court is willing to ascertain what intentions⁶ were entertained by the father during his life, and also what are the wishes of the infant, especially of a female infant⁷ who has reached the age of marriage.

The estate of the infant is sometimes under the care of a receiver, sometimes under that of the guardian. Whether it is managed by a person who bears one title or the other, the rules respecting the duties which are to be performed are precisely the same. The estate must of course be administered

¹ *Campbell v. Mackay*, 2 M. & C. 37.

² *De Manneville v. De Manneville*, 10 V. 64.

³ See *Lyons v. Blenkin*, Jac. 265; and *Mountstuart v. Mountstuart*, 6 V. 363.

⁴ *Letham v. Hall*.

⁵ *Campbell v. Mackay*, 2 M. & C. 37.

⁶ *Anon.* 2 Ves. 56.

⁷ *Ibid.*

with the utmost diligence; the benefit of the infant is to be promoted by all possible means. Acts injurious to him will be stopped, or, if they are accomplished before interference takes place, they will in some cases be the subjects of compensation; in others, they will receive such a construction as to be beneficial to the infant. For instance, if the manager of the property deals with any part of it as his own and acquires considerable profit, he will be regarded as having engaged in speculation for the infant's benefit, and be compelled to render an account founded upon that supposition. At common law, if a person intruded into an infant's estate, he was compelled to give an account upon this principle. He was regarded as placing himself in the position of a guardian in socage.¹ The same principle is maintained in Courts of equity, where any person who has taken possession of the infant's estate will be regarded as having by implication become trustee for the infant's benefit, and will be compelled to account for the proceeds.² The commencement of the account³ will be the period at which the infant's title accrued; or, if the intrusion occurred subsequently, the time of intrusion. An order for account may be had upon a bill filed by a next friend at any time during the infancy. But if after the infant has come of age, six years elapse without any proceedings on his part, he forfeits this remedy by the laches.⁴

There is one subject, connected with the management of the estates of infants by their guardians, which has given rise to numerous difficulties; it is, under what circumstances a guardian is allowed to change the nature of the infant's estate; convert realty into personalty, or personalty into realty. It is not pretended that under ordinary circumstances a person appointed by the Court of Chancery to take care of property can have any right to change its nature. On the other hand there is no ground for alleging, that in case such a conversion has for some sufficient reason taken place, either real or personal representatives have any equity for a reconversion. This subject has been considered with reference to the estates

¹ Co. Lit. 89, b.

² Cary v. Bertie, 2 Vern. 342; Gundry v. Baynard, 2 Vern. 342; Newburgh v. Bickerstaffe, 1 Vern. 295.

³ Domer v. Fortescue, 3 Atk. 125.

⁴ Lockey v. L., Prec. in Ch. 518.

of idiots and lunatics as well as to those of infants; and it has been observed that out of the different circumstances of these several classes of persons different considerations arise. An idiot is doomed to remain for his whole life in such a condition that he never can be entrusted with the disposal of his property.¹ A lunatic may recover at any time and claim the rights of ordinary persons. Till lately² an infant could bequeath personalty earlier in life than realty. Distinctions of this kind were a good deal noticed in the argument upon some of the earlier cases, but more recently they seem to have been considered unimportant, and cases have been decided upon certain general principles which will presently be mentioned. The circumstances which may give rise to the question are infinitely various in their character. For instance, upon a new life being added to a leasehold interest, the fine may be paid out of personalty; large accumulations may be made of rents and profits and be invested in the purchase of land; sums may be laid out in improving land or in repairing houses or farms; timber may be sold, having been unintentionally cut down, or having fallen through old age or decay or by the violence of the wind. It will easily be observed that in case the infant dies during infancy, his representatives will find the question important to which species of property the advantage is to be given.

If we look at the question with reference to principle rather than to decided cases, it seems clear that the Court ought to be guided upon this subject by the same rule of action which prevails upon every other branch of this jurisdiction. Thus the propriety of making the conversion should depend exclusively upon the interest of the infant; in other words, that it should take place on those occasions only in which it is required for the good management of the infant's estate. What would the infant do, if he were an adult person of correct judgment? This should be the first question considered by the Court. But so far as the interest of the infant would not be affected, there appears to be no sufficient reason for benefiting either the heir or the next of kin, at the expense of the

¹ See *Pierson v. Shore*, 1 Atk. 486.

² By Lord Langdale's Act all wills are invalid if made by persons under twenty-one years of age.

other. There is no equity between them. Thus if the interests of the infant were to require that a particular piece of land should be purchased, there would be no reason why, in case the infant died before twenty-one, the heir should have the proceeds of the purchase money, which, if the purchase were not made, would go to the next of kin. For which reason, the Court, in sanctioning the purchase, should declare that, in case the infant died before his age enabled him to ratify the purchase, his next of kin should take the estate as if it still were personalty.

We proceed then to see how far we are justified by the decided cases in suggesting these two principles; first, that the interest of the infant is to be exclusively considered; secondly, that on matters indifferent to the infant, the Court is not to interfere at all for the benefit of either heir or next of kin.

In *Ashburton v. Ashburton* a proposal was made to purchase on behalf of an infant a considerable tract of land lying contiguous to his estate. As the purchase was clearly for the infant's benefit, the Court directed that the purchase should take place: but on the other hand, as there was no reason for converting personal into real property, as regarded the infant's representatives, the Court directed that the estate should be conveyed to a trustee in trust for the infant, his executors and administrators, till he should attain the age of twenty-one years, and afterwards for him and his heirs.¹ Lord Eldon, in a later case, states the rule of the Court in the following terms: "I have universally made it a rule, since I have sat here, where property of one nature has been applied for the benefit of an infant to property of another nature, to have an express provision that if he shall not attain that age, at which he shall have a disposable power, the representative shall not be prejudiced in any degree by the act done by the Court in contemplation of the infant's benefit, in all the circumstances surprise or accident can throw around it."² Similar principles have been applied to the expenditure of a certain portion of the infant's personal property in the redemption of land-tax,³

¹ *Ashburton v. A.* 6 Ves. 6; see *Anon.* 2 Freem. 114.

² *Ware v. Polhill*, 11 Ves. 278. A distinction has been taken between infants tenants in tail, and tenants in fee. The ground of the distinction we cannot understand, and we cannot think it would now be admitted. *Tollit v. T. Amb.* 370.

³ *Ware v. Polhill*, *ubi sup.*; but see *Ex parte Phillips*, 19 Ves. 118.

and to the merger of a charge by its union with the real estate.¹ Indeed it is a principle which has long been recognized; for in a very early case,² in which a trustee had held a leasehold property for a term of years, and, upon a renewal being requested, the landlord refused any renewal except for life; Lord Chancellor King said, "This renewed lease, though for lives, shall follow the nature of the original one, and go to the executors or administrators of the infant, as that should have done." He added, that a trust to this effect is implied, "since the renewed lease, though for lives, comes in the place and stead of the original lease, which was for years."

Several discussions upon this question have arisen respecting the proceeds of sales of timber. When a fall of timber has been caused by a storm, or by the violent acts of a stranger, it has been considered that there is no room for the Court's interference, but that each class of representatives³ must accept the infant's property in its actual state. In one case⁴ an order was made that so much of the estate should be sold as was required for the payment of debts. Convenience required that the entire estate should be sold, and after the payments had been completed there remained a surplus. If the order had been strictly pursued, the value of that surplus would have been not money, but real estate; so that in consequence of the order not being distinctly followed, property which, if greater caution had been exercised, would have been land, was converted into money. But Lord Camden determined, "that the sale actually made under the decree of the Court before the master could not be considered as improperly made; that there was no fraud, no practice, and that the money ought to go to the personal representative." Where, however, the conversion has taken place, not by violence or accident, but by intention and under the order of the Court, greater doubts have been entertained. Timber may be ordered to be felled, not merely because it is in a fit state to be cut, but also because the general property will be improved by the removal of it. In such a case, were the heir allowed the price of the timber as real estate, he would gain

¹ *Thomas v. Viesneys*, 11 Ves. 271.

² *Witter v. W.* 3 P. W. 102.

³ *Exparte Bromfield*, 3 Bro. C. C. 510.

⁴ See *Flanagan v. Flanagan*, cited in *Fletcher v. Ashburner*, 1 Bro. C. C. 501.

a double advantage, one in the price of the timber, the other in the permanent improvement of the estate.

Sometimes there has been in contemplation some immediate advantage to the infant himself, as an increase of maintenance or the discharge of debts,¹ on which there is a high rate of interest. Large portions of the personal estate are frequently applied to the necessary repairs and improvements of land; and it is probable that instances of this nature will increase in frequency, as the science of agriculture makes it every day more and more apparent, that without such an application of capital justice cannot be done to landed property. In all such cases the two classes of representatives are left to take the consequences of the measures which have been adopted for the benefit of the infant. With respect to collieries the question assumes a still more formidable aspect, on account of the vastness of expenditure and the long interval which elapses between the outlay and the profitable return. Lord Loughborough² makes the following remarks upon this subject: "Suppose there was a colliery upon the estate; what consequences would follow from attending to the interests of the succession? Suppose a vein of coal actually working, but almost worn out; but that by sinking lower, and erecting a fire-engine, a considerable quantity of coal might be got at. That would be a speculation of profit and loss. If the fire-engine was large, which would occasion a considerable expense, some of them having cost 5000*l.* or 6000*l.*, the heir might think it most for his interest to have a sum of money laid out to free the colliery; and the personal representative would oppose that. But suppose the expense would be very inconsiderable; then it would be the interest of the heir to oppose the erection of the fire-engine; as there would be coals for him some time or other untouched: but it would be the interest of the personal representatives to press it on; as by laying out a small sum there would be a considerable increase of annual profits. If the Chancellor was continually looking to the right and left, and weighing the probable interests of the representatives, the interest of the lunatic would be compromised in favour of those who have no immediate interests,

¹ *Oxenden v. Lord Compton*, 2 Ves. 73.

Oxenden v. Compton, 2 Ves. 72.

² *Sergison v. Sealey*, 2 Atk. 413.

and whose contingent interests are left to the ordinary course of events. Therefore the Chancellor is to administer the estate *tanquam bonus paterfamilias*, taking every advantage fairly to increase and improve it without engaging in risks and dangerous adventures; for those are not fit enterprises. But whatever tends towards ordinary improvement, it is strictly the duty of the administrator to do, considering only the immediate interest of the proprietor of the estate." "But," he adds, "when I am laying down this so generally, I must be understood to do it with this guard, that great care must be taken that nothing extraordinary is to be attempted, as estates to be bought or interests to be disposed of. Alteration of property is as far as possible to be avoided consistently with the idea of preserving the interest of the proprietor."

We may turn to other instances of a totally different nature, in which the interest of the infant has prevailed over every other consideration. There have been substitutions of a new for an old lease, made in such a manner as to transfer the right of inheritance from the heirs *ex parte maternâ* to the heirs *ex parte paternâ*. "If," says Lord Hardwicke, "this indeed had been wantonly done by the guardian, without any real benefit to the infant, it would have been proper to come into a court of equity to be relieved against it; but here was a just and reasonable occasion for what the guardian has done, for he was directed by the mother to make purchases for the benefit of the infant."¹ We shall find that the same principle prevails in questions which involve the still wider distinction between different countries and different jurisdictions. One Vanden Bempde bequeathed a large sum of money to Lord Anandale, with a trust that it should be invested in real property in England. Part of it was invested in England, part in Scotland in land securities. Lord Anandale was found a lunatic. Lord Hardwicke observed, in giving judgment, "There is a question as to the appointment of money to be raised for maintenance of the lunatic, and payment of his personal debts between the produce of the two estates, by reason that the personal estate in Scotland at his death will be subject to a different rule of distribution, from the difference between the two laws. I am of opinion that as

¹ *Pierson v. Shore*, 1 Atk. 480.

this trust money is part of the personal estate of Vanden Bampde, and to be laid out in land in England, it is to be considered in this Court as an estate in England; and that the interest from thence, though arising out of an estate in Scotland now, yet as it is a mere transitory thing, arising on changeable securities, which may and ought to be called in (and it is directed by the will to go as the profits of the land, when purchased, ought), must be considered as part of Lord Anandale's personal estate in Scotland. Let the master settle the proportion for his maintenance and debts between the two personal estates in England and Scotland."¹ In commenting upon this decision, Lord Loughborough observed, "In the result of the case it is clear that Lord Hardwicke's determination took a line to do that which ought to be done with regard to his situation as a lunatic, without any regard to the contingent interest of those who imagined they would some time or other be his representatives."

In the general review of these authorities, we think that the uniform maintenance of the same principles may be clearly observed. We may add, that if those principles were not maintained, the due administration of an infant's estate would be involved in great embarrassments. If, for instance, leases were not to be renewed, or improvements not be made, for fear that personal representatives should ultimately be the losers: or if, on the other hand, after a vast accumulation of debt, realty could not be sold for fear of injury to the heir at law, the infant's interest would be continually sacrificed to the contingent advantage of this or that class of representatives.

We now come to the marriage of the ward; a subject on which the Court acts with the utmost circumspection, as if conscious that the discharge of the parental duty was in this respect a matter of peculiar difficulty. "The Court," says Mr. Maddock, "seem to have been fully impressed with the great truth that no act in life is of more importance to an individual than marriage; none on which the happiness of its future life so much depends."²

The first act required from the guardian is to give security

¹ Oxenden v. Compton, 11 Ves. 77.

² 1 Mad. Ch. Pr. 348.

that the infant shall not be married¹ except with the knowledge of the Court. The recognizance to this effect is worded in such a manner that the guardian will not have satisfied his obligation, if marriage takes place without his knowledge. His duty is to prevent its taking place at all. In one² or two cases there has been so far a variation from the usual form, that the forfeiture of the recognizance has been made to depend upon the consent, privity, or connivance of the guardian. What may have been the peculiar circumstances on which the Court relied in those cases, we are not aware; but respecting the nature of the general rule, we see no doubt at all, nor do we think it too much to require such attention from the guardian as to render a clandestine marriage absolutely impossible. The Court, having bound the guardian in this recognizance, gives him every assistance in the discharge of his duty. On the first application it acts in the way of punishment³ or prevention, as circumstances may permit. Not only actual marriage but the mere endeavour to marry is a contempt.⁴ An injunction will be issued preventing all persons, or any particular person, from aiding the attempt, cutting off all communication with the ward whether personal or by letter, forcing the production of all correspondence and compelling the delivery of the ward's person into some custody which may be considered secure.⁵ Children will be taken even from a parent;⁶ or the parent, if allowed to keep them, will be⁷ subjected to the closest restrictions. The inquiries into circum-

¹ *Eyre v. Shaftesbury*, 2 P. Wms. 112.

² *Davis's case*, 1 P. W. 698.

³ *Wader v. Yorke*, 19 Ves. 453. A curious instance of the operation of this branch of jurisdiction occurred not very long ago. A lady, well known in the fashionable world, who lives apart from her husband, accidentally discovered that her son, an infant, was on the point of making a most objectionable marriage. Her husband was out of town; and as the marriage was to take place within twenty-four hours no time was to be lost. She repaired to her solicitor, who immediately consulted a distinguished equity draughtsman. A certain amount of property was conveyed to the infant. A bill was put upon the file making him a ward in Chancery, and, a few hours before the time fixed for the ceremony, an injunction was issued to restrain all parties from performing it.

⁴ *Smith v. Smith*, 3 Atk. 305.

⁵ *Pearce v. Crutchfield*, 14 Ves. 206; *Smith v. Smith*, 3 Atk. 302.

⁶ *Roach v. Gawan*, Dick. 88.

⁷ *Shipbrook v. Hinchinbrook*, 2 Dick. 547.

stances of suspicion will be subject to none of the ordinary and technical¹ rules of evidence. If the marriage has been actually carried into effect, the Court takes proceedings against the married couple and also against all persons who, whether through negligence or intention, have assisted in carrying it into effect. It has not been² admitted as an excuse that a person was ignorant that the bride was a ward of Court. Sequestration has issued against a peeress.³ The person who gave⁴ away the bride, and the clergyman who performed the ceremony, have been⁵ committed; barristers have been forbidden to practise, and have been struck out of the commission of the peace;⁶ attornies and solicitors have been struck⁷ off the rolls; in short, all persons, whatever their situation, have been punished in order that these improper marriages may be prevented by the summary authority of the Court. In some cases that authority is not considered severe enough, and the matter is referred to the Attorney-General, that he may determine whether there are sufficient grounds for information⁸ or indictment.

But while the Court deals severely with the accessories to the offence, it acts towards the married couple upon principles rather of a parental than of a coercive character. Imprisonment is by no means a necessary consequence of their offence. The consideration rather is, what course will be the most conducive to the general interests of the ward and of the issue of the marriage.⁹ Where¹⁰ a man clandestinely married a ward of fourteen years of age, he was not only committed for contempt, but, under the direction of Lord Eldon, was prosecuted and convicted. It was not until after he had suffered punishment that he was allowed to present a petition praying that upon executing such a settlement as met the master's approbation, he might be discharged. But generally speaking it seems that upon a clandestine marriage with a ward the process for the contempt is put into force only with a view to

¹ *Beard v. Travers*, 1 Ves. sen. 313.

² *Ib.*; and *Priestley v. Lamb*, 6 Ves. 420; and *Nicholson v. Squire*.

³ *Eyre v. Shaftesbury*, 2 P. Wms. 112.

⁴ *More v. More*, 2 Atk. 157.

⁵ *Nicholson v. Squire*, 16 Ves. 259.

⁶ *Mitchell's case*, 2 Atk. 173.

⁷ *Ib.*

⁸ *Goodale v. Harris*, 2 P. Wms.

⁹ *Leeds v. Barnardiston*, 4 Sim. 538.

¹⁰ *Millett v. Rowse*, 7 Ves. 419; *Wade v. Broughton*, 3 V. & B. 172; *Ball v. Coutts*, 1 V. & B. 297; see *Pearce v. Crutchfield*, 16 Ves. 48.

obtain a proper settlement. A mere undertaking to make a settlement is not sufficient; but as soon as the settlement itself has been actually executed, the husband is dismissed from¹ custody. Lord Eldon observed in a well-known case,² "In sending this case to the master, though a case of contempt, I illustrated the principle upon which I have uniformly acted; and what the Court will do upon the head of contempt must be the subject of its sound discretion. Of the peculiar circumstances now brought forward on both sides I know nothing. It is not at present my intention to say more than this, that if it was intended at the bar to dispute the right of the Court to take notice at any time of a contempt committed by marrying a ward of the Court, I do not agree that time will affect the right of the Court to interpose. On the other hand, I have no doubt that as the jurisdiction upon this head must be exercised according to a sound discretion in cases of that sort, especially in such a case as this, many circumstances must be considered, before the Court determines what is to be done."

In the following case we have a curious instance of the mode in which a ward of Court will be protected after a clandestine marriage. A woman³ of bad character made a ward drunk and induced him to marry her. As he had no sufficient property to sustain his wife till he came of age, his mother, who had been appointed guardian, put him out as an apprentice, upon which his wife sued him in the ecclesiastical Court for alimony, and the restitution of conjugal rights. A monition issued to the mother for payment of a certain sum by way of alimony, and the payment not having been made, and the wife not being received by the ward, excommunication was pronounced against him and his mother. The Court was here placed in a difficulty. On the one hand respect was due to the undoubted jurisdiction of the ecclesiastical Court, on the other the authority of the Court of Chancery in protecting infants was to be vindicated: and it was justly observed that if the wife was not to be restrained, all the care the Court had exercised with regard to the estate and person of the infant

¹ Bathurst v. Murray, 8 Ves. 75.

² Ball v. Courtts, 1 V. & B. 297.

³ Hill v. Turner, 1 Atk. 515.

would have been taken for no purpose. All the proceedings of the wife had been in utter violation of the rules of the Court of Chancery, for if the marriage had taken place with the perfect consent of the ward's friends, the provision of alimony should have been obtained by way of increased maintenance in Chancery and not by a suit in the ecclesiastical Court. The course adopted by Lord Hardwicke under these circumstances was to restrain the wife from proceeding in the ecclesiastical Court and to direct that upon application being made to that Court for the absolution of the mother and infant from the sentence of excommunication, the wife should consent to an order in those terms.

When a proposal of marriage is made to a ward, the Court orders a reference to the master to enquire whether the match is suitable, and if so, what settlement ought to be made.¹ The master appears to proceed upon the same principles upon which a cautious parent would proceed in considering a marriage of a daughter who has had little experience of the world, and for whose future interests as well as for those of any children that may be the issue of the marriage, proper provision is to be made. What those principles are, is a question which is to be decided rather by knowledge of the world and of society than by reference to law books, and one which we shall therefore leave without further consideration.

With reference to those cases in which marriage has already taken place, the reports are more fertile in authorities. We do not mean to say that one case will ever precisely govern another; still a short reference to some of the most remarkable cases will supply an outline of those subjects to which the Court pays the principal attention. The references upon this subject are sometimes made after the ward comes of age, sometimes at an earlier period:² but in any case in which an application is made to the Court for the fortune of a married woman, the Court has a right, which it never fails to exercise, of imposing upon the husband any terms which the interest of the wife appears to require.

In *Chessaing v. Parsonage*³ a tutor ran away with his pupil, kept her as his mistress while another woman was his reputed

¹ *Smith v. Smith*, 3 Atk. 305.

² *Ball v. Coutts*, 1 V. & B. 300.

³ 5 Ves. 18.

wife, and married her some years later when she had attained the age of twenty-one years. In making his application he alleged that he had incurred debts in supporting her and prayed that those debts might be paid out of her fortune. Lord Loughborough refused to sanction such a proposal. "The utmost," he said, "that the husband could obtain (and I doubt whether I could go so far) would be that the settlement should be to her separate use for life, and after her death to her children, with a power to her to give him a part during his life. But as to paying his debts, incurred under these circumstances, after having carried her away, one of his scholars, and living with her in such a way, that his marriage with her would not have been near so great an offence, the attempt is in my opinion an insult to the Court." Numerous other cases support the doctrine that the Court is at liberty, if it sees fit, to settle all the ward's property upon her exclusively and her children, and to give nothing to the husband.¹

But generally speaking a settlement in which the husband takes no benefit at all will not be sanctioned. Lord Eldon's principle was, that "there cannot be much expectation of happiness, where the husband has nothing, and the wife has the whole control over the property."² Upon the same principle there will be conferred upon him some authority over the properties of his children;³ Lord Eldon in a judgment already referred⁴ to mentions some of the various points which introduce so many distinctions between cases of this class. In one, a beggar marries for the ward's fortune; in another, there is a great difference of rank; in a third, rank and fortune are equal. Again, the parties in some instances have lived most respectably, in others have grossly misconducted themselves since the time of the marriage. Such and a thousand other circumstances which arise out of the events of life must fall under the consideration of the master and afterwards of the Court. Setting aside all peculiarities, the usual form of settlement is well understood. "The usual⁵ settlement," says

¹ Like *v.* Beresford, 3 V. 502. See *Priestly v. Lamb*, 6 Ves. 424; *Millet v. Rowse*, 7 V. 419; *Hodgens v. H.* 11 Bli. 62; *Lloyd v. Goold*, P. 299.

² *Bathurst v. Murray*, 8 V. 77

³ *Stevens v. Savage*, 1 V. 154.

⁴ *Bell v. Countts*, *ubi sup.*

⁵ 1 Mod. Ch. Pr. 351.

Mr. Maddock, "seems to be to settle one fifth of the dividends and interest of the property upon the husband, and the residue upon the wife for her sole and separate use during their joint lives, with a clause to prevent anticipation, and a power to the wife to give another one fifth to the husband by will; the residue, subject to a provision for maintenance, to accumulate, and with the principal to go to the children at their ages of twenty-one or marriage, or if only one child, to that; and in the event of a second marriage a power to the wife to charge by way of appointment to each child by the first marriage. In case of no children, the husband surviving, the limitation is, in default of appointment, to the next of kin exclusive of the husband."

We must particularly remark the rule which is observed, of leaving to a female ward some power with reference to a future marriage. "It is not the habit of the Court," said Sir John Leach, in a well known case, "to settle the whole of her property in remainder, after an estate for life to her, upon the child or children of that marriage; because it may happen that she may be left a very young widow, and ought therefore to have the means of making some provision in that case for a second family. The event which has happened in this case proves the wisdom of that rule of Court."¹ Of course this rule is adopted with more than usual strictness, if the bulk of the property to be settled comes from the lady. For instance, when a female infant marries, it is not sufficient with a view to the provision which would be required in case of a second marriage, to invest her with powers over real estate, for events may so happen, that she may be desirous of exercising them before she comes of age. The children by her first husband are not considered to have an exclusive claim upon her estates, a portion of them must be reserved for the prospect of a second family.²

In considering these cases it will be at once apparent that the interest of the ward is the point to which the Court directs its attention. In that are involved the interest of her husband and the interests of her children, and also her power to make a settlement upon any future marriage. All these several in-

¹ Long v. Long, 2 S. & S. 124.

² See Halsey v. H. 9 V. 471.

terests must be taken into account by the master ; who, if any of them are omitted, will be directed to review his report.¹

We have observed that upon the infant's obtaining the age of twenty-one years the wardship terminates. But this simple circumstance does not alone put an end to the protection of the Court. For in the case of a woman it has frequently happened that settlements have been altered or modified with reference to the due support of her interests. Lord Eldon observed² in a case of this kind, that " he wished it to be understood that though a female ward of the Court when of age might make whatever settlement of her property she pleased, and might effectuate this by consenting personally in Court, or under a commission for the purpose ; yet that where this was not done, her property would never be discharged from the protection of the Court, except by the order of the Court, and consequently until such proceeding she and her property must always be considered as having the protection of the Court still around her. In the case before the Court his lordship saw no objection. He did not anticipate any when he made the reference, and therefore it was a stronger case to settle the practice upon."³

Such is the general outline of this remarkable jurisdiction. In many respects it would seem to be more suitable to a Court ecclesiastical than to a Court which deals with the rights of property. The moral and even religious subjects which are ingredients in many of the ordinary questions,—for instance, who is most fit to be guardian, which is the most proper course of education, or whether a particular proposal of marriage ought to be accepted,—are more closely akin to the inquiries into domestic habits which are constantly discussed in the ecclesiastical Courts, than to the arguments which are habitual in Courts of equity and are founded upon the value or goodness of a consideration. When however we consider the origin of the jurisdiction and its leading principles, we easily understand why it has passed into a Court chiefly conversant with property. From the earliest times the guardian in socage took

¹ See *Birkett v. Hibbert*, 3 M. & K. 229.

² *Austen v. Halsey* 2 S. & S. 123.

³ See *Long v. Long*, 2 S. & S. 119.

charge of his ward, simply as a person entitled to land. Every feudal chief performed similar duties for a similar reason, and the feudal sovereign provided for the infant tenant in knight service out of regard to the important fief which the child had inherited. Thus property has always been the main-spring of the system. We fear too that our early history teems with evidence that the guardians of old, especially the guardians in chivalry, regarded their wards almost exclusively as a source of profit. There was a fine for his wardship, another for his marriage; and his income during his wardship was subject to very serious inroads. In all these respects we venture to think that our modern system is completely pure. The management of the infant's estates is in many respects more cumbrous and expensive than circumstances may require: but his estates are not to be plundered, nor his person sold in marriage for the benefit of a guardian; the utmost caution is used in the consideration of proposals for marriage, and, when the infancy ceases, the most explicit account is required of the entire proceeds of the property. But the modern wardship resembles that of ancient times in so far as it springs out of property.

In the bill by which the infant is made a ward, the prayer is for the due administration of the estate. In complying with the prayer the Court secures to the infant a good education, which may enable him to use the property in a manner worthy of his station for the advantage of himself and of all around him. The Court accepts the infant into wardship because he has property, and then administers the property as much as possible for his benefit.

Whether this jurisdiction is the best possible that can be devised, whether the attention of the master, and the superintendence of the Court are the best means of control, may admit of considerable doubt. But in discussions upon the subject it must be uniformly borne in mind, that the persons to be relieved have been placed by the events which have occurred in a difficult position. The parents are either dead, or too wicked or for some other reason unfit to be entrusted with the care of their children, and thus the guardians whom nature usually provides are wanting: it is no matter of astonishment that the substitute devised by man very imperfectly supplies the defect. When we consider that the education

of the infant must derive its character in a great degree from the amount and nature of his property, and that his property must be used in such a manner as to support his education, we see great advantage in combining in one system the management of property and person, and we think that to the accomplishment of this twofold object, the Court of Chancery is better adapted than the Courts of law on the one hand, or the Courts ecclesiastical on the other. The authority is one, to which, wherever it exists, so much discretion must of necessity be attached, that its benefit or mischief will arise almost exclusively from the mode in which it is put into exercise; it is an authority to which Lord Bacon's remark is very strongly applicable, "that the life of the laws is in the administration of them."

Wardship of persons who have no property comes under a totally different branch of the law. It includes custody of the person only. The Court of Chancery is open to every infant who is a pauper, not peculiarly as an infant, but in common with all other paupers. His claims, if he has any, may be thus asserted, but the care of his person, his education and maintenance are portions of the general administration of the poor law.

This article ought not to be closed without some reference to the Custody of Infants' Act,¹ which enables the Court of Chancery to exercise over infants who are not wards, a very important power which it has always exercised over wards. If a ward is in the custody of a guardian, an order may be made under the general authority of the Court for regulating the access which the mother ought to enjoy. But no such order could be made, previous to the recent act, with respect to infants who were not wards. The present Lord Chancellor made the following remarks² upon the propriety of enlarging this jurisdiction of his Court.

"The Court of Chancery has the general jurisdiction over the property of infants, and where the infant has property it exercises a jurisdiction over the infant; but that Court has no power in ordinary cases. If £100 be settled upon the child, then the Court has power, but not else. I quite agree that it would be well if the Court of Chancery had the

¹ 2 & 3 Vict. c. 54.

² *Mirror of Parliament*, July 18, 1839.

power to interfere in cases where there is no nominal settlement; and if it be the pleasure of your Lordships' house to give to the Court of Chancery a certain control over the custody of infants in all cases as between the father and the mother, it will be the primary duty of that Court to take care of the infant. I am aware that when the parents of the child are at variance, it is a matter of great difficulty so to arrange the claims of the two parents to the custody as not to do an injury to the child itself. But with due caution, and paying the requisite regard to the interests of the child first, and of the parent next, it does appear to me that we might, if we had the power, do much to obviate that injustice and hardship which are now so properly made the matter of complaint."

One remarkable case¹ upon this act has been already brought before the Chancellor, but we can only afford space for a very scanty outline.

Mr. and Mrs. Taylor were married in 1830, they have had six children, of whom five are now alive. Shortly after the marriage, Mrs. Taylor engaged in her service as nurse a person named Hannah Morris, who appears to have been treated by both parents with great confidence and familiarity. Mrs. Taylor was informed in 1837 that her husband had had criminal intercourse with Hannah Morris, and in consequence of advice which she received from an intimate friend quitted her husband's house, and gave him notice of the accusation which had been brought against him. He distinctly denied it, and took measures for effecting a reconciliation, but without success. Mrs. Taylor continued for some time to live separated from her husband and children, but at length, worn out with the pain of her position and finding that her husband intended to cut off all communication with her children, offered the most ample submission, and expressed her anxiety to return home and to bury all that had passed in oblivion. In July, 1838, Mrs. Taylor instituted a suit in the Ecclesiastical Court for restitution of her conjugal rights, and was successful. The Court of Arches, upon appeal, came to the same decision, and at the time at which the appli-

¹ In *re Taylor*, July 31st, 1840. The judgment of the Vice-Chancellor was given on the 3rd of August.

cation to the Vice-Chancellor took place an appeal was pending before the Privy Council. Soon after the decision in the Court of Arches Mrs. Taylor became convinced that the charge which she had made against her husband was utterly groundless. She at once communicated to him her disbelief of it and acknowledged her error, and intreated in the most humble terms to be re-admitted into his family; her request was refused. Such was the general state of the case when she presented her petition under the new act, relying upon those words in which the judge is empowered, "if he shall see fit, to make order for the access of the petitioning mother to such infant or infants at such times and subject to such regulations as he shall deem convenient and just." The affidavits filed upon each side were very numerous; they involved a great deal of contradiction upon the material facts of the case and upon collateral circumstances, and revealed, in terms calculated to give infinite pain, a number of domestic transactions.

The Vice-Chancellor refused to interfere upon these several grounds; first, that as Mr. Taylor and the children were abroad, the Court, if it made an order, could not enforce it; secondly, that, as the wife now admitted, she had left her husband's home without any cause; thirdly, that the proceedings in the ecclesiastical Court might possibly terminate in such a manner as to render the interposition of the Court quite unnecessary. He therefore made no order, but gave leave to all parties to apply again to the Court.

The result of the proceeding is, that Mrs. Taylor derives for the time no benefit from the act. Without however venturing any opinion upon a matter which must be regarded as still *sub judice*, we must observe that the circumstances are by no means favourable to the application, and that they are such as would not justify any inference as to the general working of the statute. Indeed Sir W. Follett, the leading counsel for the respondent, argued that the case was one to which the statute could not be considered applicable in any way.

C.

ART. III.—THE LIFE OF SIR SAMUEL ROMILLY.

Memoirs of the Life of Sir Samuel Romilly, written by himself; with a Selection from his Correspondence. Edited by his Sons. In Three Volumes, 8vo. London. 1840.

SIR Samuel Romilly was to the criminal law of England, what Clarkson was to the slave trade, Howard to prison discipline, or Lord Brougham to popular education. He kept his name before the public during many years by a series of persevering efforts to blot out some peculiarly objectionable enactments from the statute book; he was the acknowledged leader of the equity bar; he had held a high office, was reasonably looking forward to the very highest, and occupied a distinguished position in the Whig party; who, to do them justice, are ever ready to make the most of every species of merit or celebrity that may chance to be discovered amongst their proselytes. Yet his fame was beginning to die out, like that of Horner, or that of Mackintosh before the recent publication of his son, and people were beginning to ask what Romilly had actually done to make his authority still quoted with such unfeigned tokens of respect by his cotemporaries, when the question was opportunely answered by this book; which, however, it is a palpable misnomer to call *Memoirs of his Life*, with the *Selections from his Correspondence*, for the narrative occupies just one-twelfth part of the three volumes, and the correspondence is very far indeed from meriting the appellation of select.

Most of the letters addressed to Mr. Roget, for example, are filled with common-place opinions on common-place topics, and the labour of wading through them is ill repaid by occasional bits of personal history, or a few striking observations on the great men and measures of the day,—Burke, Pitt, Fox, Lord North, the American and French revolutions, the Gordon riots, and parliamentary reform. The diary of his parliamentary life is not open to the same objection: it forms the most authentic record of his conduct and opinions at a period when they were exercising a marked influence; and we cannot assent to the doctrine that delicacy required any passages of it to be suppressed. At the same

time, it not merely authorises but challenges the most unreserved discussion, and his sons have now clearly no reason to complain, should their father's character be subjected to the most trying analysis with the view of finding out the key to the many harsh judgments he has passed on his competitors, or the many confined notions he entertained regarding English laws and institutions.

Sir Samuel Romilly was born on the 1st March, 1751. He was descended from a respectable family in the south of France. His grandfather gave up his country and his patrimony rather than submit to the persecutions to which the professors of the reformed religion were exposed during the latter years of Louis the Fourteenth's reign, and set up business in the neighbourhood of London as a wax-bleacher. He died poor, leaving a large family unprovided for. The youngest son, Peter, the father of Sir Samuel, was apprenticed to a jeweller in Broad Street, and appears to have made himself a thorough master of his business, for we subsequently find him mentioned as one of the leading jewellers of the day. He fell in love with the sister of his fellow-apprentice, Garnault, and after a protracted opposition on the part of her family, was united to her. But her health and spirits had received a fatal shock from their unkindness, and she remained through life incapable of taking an active share in the management of the household, or the education of her children.

"We were brought up principally by a very kind and pious female relation of my mother's, a Mrs. Margaret Facquier, who had lived in our family ever since my mother's marriage. She taught us to read, and to read with intelligence; though the books in which we were taught were ill suited to our age. The Bible, the Spectator, and an English translation of Tellemachus, are those which I recollect our having in most frequent use. But this kind relation had too bad a state of health to attend to us constantly. During the last forty years of her life, it seldom happened that many weeks passed without her being confined to her bed, or at least to her room. The care of us, upon these occasions, devolved on a female servant of the name of Mary Evans, who was ill qualified to give us instruction or to cultivate our understandings; but

whose tender and affectionate nature, whose sensibility at the sufferings of others, and earnest desire to relieve them to the utmost extent of her little means, could hardly fail to improve the hearts of those who were under her care.

“ It is commonly said to be the happy privilege of youth to feel no misfortunes but the present, to be careless of the future, and forgetful of the past. That happy privilege I cannot recollect having ever enjoyed. In my earliest infancy, my imagination was alarmed and my fears awakened by stories of devils, witches, and apparitions; and they had a much greater effect upon me than is even usual with children; at least I judge so, from their effect being of a more than usual duration. The images of terror, with which those tales abound, infested my imagination very long after I had discarded all belief in the tales themselves, and in the notions on which they are built; and even now, although I have been accustomed for many years to pass my evenings and my nights in solitude, and without even a servant sleeping in my chambers, I must, with some shame, confess that they are sometimes very unwelcome intruders upon my thoughts. I often recollect, and never without shuddering, a story which, in my earliest childhood (for my memory hardly reaches beyond it), I overheard, as I lay in bed, related by an old woman who was employed about our house, of a servant murdering his master; and particularly that part of it where the murderer, with a knife in his hand, had crept, in the dead of the night, to the side of the bed in which his master lay asleep, and when, as from a momentary compunction, he was hesitating before he executed his bloody purpose, he on a sudden heard a deep hollow voice whispering close to his ear in a commanding tone, ‘ that he should accomplish his design !’

“ But it was not merely such extravagant stories that disturbed my peace; as dreadful an impression was made on me by relations of murders and acts of cruelty. The prints, which I found in the lives of the martyrs and Newgate Calendar, have cost me many sleepless nights. My dreams too were disturbed by the hideous images which haunted my imagination by day. I thought myself present at executions, murders, and scenes of blood; and I have often lain in bed

agitated by my terrors, equally afraid of remaining awake in the dark, and of falling asleep to encounter the horrors of my dreams. Often have I in my evening prayers to God besought him, with the utmost fervour, to suffer me to pass the night undisturbed by horrid dreams."

Another fear which haunted him was that of his father's death :

" I remember once accompanying him to the theatre on a night when Garrick acted. The play was *Zara*, and it was followed by the farce of *Lethe*. The inimitable and various powers of acting, which were displayed by that admirable performer in both those pieces, could not for a moment drive from my mind the dismal idea which haunted me. In the aged Lusignan I saw what my father in a few years would be, tottering on the brink of the grave : and when in the farce the old man desires to drink the waters of *Lethe* that he may forget how old he is, I thought that the same idea must naturally present itself to my father ; that he must see as clearly as I did that his death could not be at the distance of many years ; and that, notwithstanding his apparent cheerfulness, that idea must often prey upon his mind, and poison his happiness more even than it did mine. I looked at his countenance as he was sitting by me, persuaded myself that I observed a change in his features, conjectured that the same painful reflections had occurred to him as had to me, repented of having entered the theatre, and returned from it as sad and as dejected as I could have done from a funeral."

The old adage, " the child is father to the man," was never more strikingly exemplified. We here see plain traces of the over-wrought sensibility and disordered imagination which shortened his life.

He gives a very bad account of his first schoolmaster, who pretended to teach Latin without knowing a syllable of the language, and treated the young Romillys with marked distinction on account of the superior gentility of their father's trade to that of the barbers, butchers and bakers, who formed the principal support of the academy. He nevertheless continued in it for several years without learning anything but writing, arithmetic, and the rules of the French grammar. His father was anxious that he should learn Latin, to fit him

for the profession of the law, i. e. for that of an attorney, to which the son contracted an insuperable aversion from an accidental circumstance—

“ But, unfortunately for the success of his plan, there was one attorney, and only one, among his acquaintance, a certain Mr. Liddel, who lived in Threadneedle Street, in the city, and was, I believe, a man eminent enough in his line. He was a shortish fat man, with a ruddy countenance, which always shone as if besmeared with grease; a large wig which sat loose from his head; his eyes constantly half shut and drowsy; all his motions slow and deliberate; and his words slabbered out as if he had not exertion enough to articulate. His dark and gloomy house was filled with dusty papers and voluminous parchment deeds; and in his meagre library I did not see a single volume which I should not have been deterred by its external appearance from opening. The idea of a lawyer and of Mr. Liddel were so identified in my mind, that I looked upon the profession with disgust, and entreated my father to think of any way of life for me but that; and, accordingly, all thoughts of my being an attorney were given up as well by my father as myself.”

The next plan was to make a merchant of him through the instrumentality of Sir Samuel Fludyer, a near connection; and as a preparatory step, it was thought fit that he should acquire the art or science of book-keeping.

“ A master was accordingly provided for me. I was equipped with a set of journals, waste books, bill books, ledgers, and I know not what; and I passed some weeks in making careful entries of ideal transactions, keeping a register of the times when fictitious bills of exchange would become due, and posting up imaginary accounts. I should have lost more time than I did in this ridiculous employment, if my instructor, Mr. Johnson, as he was called, (but whose name was perhaps as fictitious as those of my correspondents at Amsterdam, at Smyrna, and in both the Indies, and to whose merits my father had been introduced only by an advertisement in a newspaper,) had not suddenly decamped to avoid his creditors. Events which soon afterwards happened made it unnecessary to look out for a new professor of the mercantile science. Sir Samuel Fludyer died of an apoplexy; Sir Thomas did not

long survive him ; and all the prospects of riches and honours which we thought opening upon me were shut out for ever."

Other plans proved equally abortive, and at the age of fourteen he still remained without any fixed destination, and began to be employed in his father's business because there was no other occupation to be found for him. His duty was simply to keep the accounts, and sometimes take orders from the customers.

" In this occupation about two years of my life were spent. It was an occupation which never pleased me but in one respect ; it imposed little restraint upon me, and left me many hours of leisure. These I employed in reading, which had been for some time my principal amusement. I read, without system or object, just such books as fell in my way, such as my father's library afforded, and such as several circulating libraries, to which I subscribed in succession, could supply. Ancient history, English poetry, and works of criticism, were however my favourite subjects ; and poetry soon began to predominate over them all. After a few attempts, I found myself, to my unspeakable joy, possessed of a tolerable faculty of rhyming, which I mistook for a talent for poetry. I wrote eclogues, songs, and satires, made translations of Boileau, and attempted imitations of Spencer. My feeble verses and puerile images were received with the most flattering applause by my family, and afforded supreme delight to myself. I was soon persuaded that I possessed no inconsiderable share of genius. My father's business became every day more unpleasant to me, and I lamented that I had not been educated for some profession connected with literature. I considered that it was not yet too late for me, with an abundance of zeal, to make a very great progress. I determined therefore, when I was between fifteen and sixteen years of age, to apply myself seriously to learning Latin, of which I at that time knew little more than some of the most familiar rules of grammar. Having made myself tolerably master of the grammar, I was fortunate enough to meet with a very good scholar in a Scotchman of the name of Paterson, who kept a school in Bury Street, St. James's, and who became my instructor. From him I every day received a lesson, which consisted in his correcting my Latin exercises, and hearing

me construe a few pages of some Latin author. But the hour I passed with him was a very small portion of the time which I every day dedicated to this new study. I consumed the greatest part of my time in poring over Cæsar, Livy, and Cicero; in consulting, at every difficulty, the translations of those authors which I had procured; and in making translations of my own, first from Latin into English, and then back again into Latin.

“ In the course of three or four years during which I thus applied myself, I had read every prose writer of the ages of pure Latinity, except those who have treated merely of technical subjects, such as Varro, Columella, and Celsus. I had gone three times through the whole of Livy, Sallust, and Tacitus: I had read all Cicero, with the exception, I believe, only of his Academic questions, and his treatises *De Finibus*, and *De Divinatione*. I had studied the most celebrated of his orations, his *Lælius*, his *Cato Major*, his treatise *De Oratore*, and his Letters, and had translated a great part of them. Terence, Virgil, Horace, Ovid, and Juvenal, I had read again and again. From Ovid and from Virgil I made many translations in verse, for so I ought to call them, rather than poetical translations. At the time, however, they appeared to me to have such merit, that I remember reading with triumph, first Dryden’s translation, and then my own, to my good natured relations, who concurred with me in thinking that I had left poor Dryden at a most humiliating distance; a proof certainly, not of the merit of my verses, but of the badness of my judgment, the excess of my vanity, and the blind partiality of my friends.

“ In ranging through such a variety of authors and studying their works, I did not imagine that I was doing any thing extraordinary. With great simplicity, I supposed that a similar course of reading entered into the plan of education adopted at our public schools and universities. Greek I attempted, but with no success; and, after seriously considering the difficulties which the language presented, and the little probability there was at my time of life of my ever becoming completely master of it, or even of my making in it any tolerable progress, without sacrificing a large portion of time which might be more usefully employed, I renounced the

hope of ever reading the Greek writers in the original. I determined, however, to read them; and I went through the most considerable of the Greek historians, orators, and philosophers, in the Latin versions, which generally accompany the original text.

“My reading had been so various that I had acquired some slight knowledge of a good many sciences. Travels had been one of my favourite subjects; and, as I seldom read either travels or history without maps before me, I had acquired a tolerable stock of geographical knowledge. I had read, too, a good deal of natural history, and had attended several courses of lectures on natural philosophy, given by Martin, the optician in Fleet Street, by Ferguson, and by Walker.

“My father’s taste for pictures and prints could hardly fail of being communicated to his children. I found a great source of amusement in turning over the prints he was possessed of, became a great admirer of pictures, never omitted an opportunity of seeing a good collection, knew the peculiar style of almost every master, and attended the lectures on painting, architecture, and anatomy, which were given at the Royal Academy.”

The result was that in the course of these two years he had given himself an excellent education, indeed, allowing for the palpable superiority of a voluntary course of reading, a much better education than is ordinarily received at a university. The time was fortunately at hand when he was to be placed in a fair way of deriving the full advantage from his diligence.

“Among other changes, a very considerable one had taken place in my father’s circumstances. A very rich relation of my mother’s, a Mr. de la Haize, had died, and had left us very large legacies. To me and my brother 2000*l*. a-piece, to my sister 3000*l*., to my father, my mother, and Mrs. Facquier, legacies of about the same amount for their lives, with remainder to my brother, my sister, and myself, and to each of us a share of the residue of his fortune equally with the rest of his legatees. The whole property bequeathed to us amounted together to about 14,000*l*. or 15,000*l*. Blessed be his memory for it! But for this legacy, the portion of my

life which is already past must have been spent in a manner the most irksome and painful, and my present condition would probably have been wretched and desperate. I should have engaged in business ; I should probably have failed of success in it ; and I should at this moment have been without fortune, without credit, and without the means of acquiring either, and, what would have been most painful to me, my nearest relations would have been without resources."

He draws a delightful picture of their domestic circle, thus privileged to sit basking in prosperity ; but he is compelled to admit that he had frequent returns of his constitutional despondency, and that his happiness was often poisoned by the reflection that some time or other it must end. We pass on to his first adoption of the law.

"The dislike which I had conceived for my father's business every day increased, and I earnestly wished for some other employment. My indulgent father readily yielded to my wishes, and, after some consideration, it was determined that I should enter into some department of the law. The Commons were first thought of ; but it was afterwards judged, by the friends whom my father consulted, that a more advantageous situation for me would be the office of the Six Clerks in Chancery. This was accordingly decided on ; and, at the age of sixteen, I was articled to Mr. William Michael Lally, one of the sworn clerks in Chancery, for a period of five years. The prejudice which Mr. Liddel had inspired me with against all lawyers had been before this time removed ; but if any vestige of it had remained, it must have yielded to the temper and manners of Mr. Lally. A strong natural understanding, improved by much reading, and much knowledge of the world, a high sense of honour, the purest integrity, a very brilliant fancy, great talents for conversation, an extraordinary flow of spirits, and a most convivial disposition, were the predominant characteristics of this amiable and estimable man.

"I had not, it was not possible indeed that I should have, any accurate idea of the business of a sworn clerk in Chancery till I had adopted it for my profession. His business lies in a very narrow compass : it consists almost entirely in making copies of bills, answers, and other pleadings in Chancery ; in receiving notices of motions to be made in

suits, and the service of orders pronounced by the court, and transmitting them to the solicitors of the different suitors ; and in occasional attendance upon the Court of Chancery at the hearing of causes, and upon the masters in Chancery when they are proceeding upon matters referred to them. Except these attendances, all the business of a clerk in court is transacted at a public office in Chancery Lane. Mr. Lally acted, as indeed did most of the other clerks, as a solicitor in Chancery as well as a clerk in court ; and his business of a solicitor procured me much more attendance upon the court, and in the master's offices, than I should have otherwise had. In these occupations I found no amusement, and took little interest ; but they still left me a great deal of leisure. The office was open only during certain hours of the day. In the time of vacation, and in one season of the year for three months together, no attendance was required. The paternal house still continued to be my home, and I still had the means of pursuing, with little intermission, my favorite studies and amusements. I had soon laid out the plan of my future life, *which was to follow my profession just as far as was necessary for my subsistence, and to aspire to fame by my literary pursuits.* For a few years I still cultivated the talent for poetry which I supposed myself to possess. But insensibly, as my judgment improved, my self-admiration abated ; I even grew dissatisfied with what I wrote, and before I had attained my nineteenth year I had the sense, and I may say the good taste, to wean myself entirely from the habit of versifying. I did not, however, relinquish the pleasing hope, for such it was to me, of becoming a very distinguished author. I began, therefore, to exercise myself in prose compositions ; and, judging translations to be the most useful exercise for forming a style, I rendered into English the finest models of writing that the Latin language afforded ; almost all the speeches in Livy, very copious extracts from Tacitus, the whole of Sallust, and many of the finest passages in Cicero. With the same view of improving my style, I read and studied the best English writers, Addison, Swift, Bolingbroke, Robertson, and Hume, noting down every peculiar propriety and happiness of expression which I met with, and which I was conscious that I should not have used myself."

Whilst he was thus occupied, he formed an acquaintance with the Rev. John Roget, the officiating clergyman of the French Chapel attended by the family, a gentleman of taste, eloquence, and varied acquirements, who was the first to appreciate the talents of his young friend and admirer at their just value. In one respect, however, it may well be doubted whether Romilly had much reason to be grateful to him:

“Roget was an admirer of the writings of his countryman, Rousseau, and he made me acquainted with them. With what astonishment and delight did I first read them! I seemed transported into a new world. His seducing eloquence so captivated my reason, that I was blind to all his errors. I imbibed all his doctrines, adopted all his opinions, and embraced his system of morality with the fervour of a convert to some new religion. That enthusiasm has long since evaporated; and though I am not even now so cold and insensible, as to be able under any circumstances to read his writings with an even and languid pulse, and unmoistened eyes, yet I am never tempted to exclaim, *Malo cum Platone errare, quàm cum aliis vera sentire*,—a motto which I once seriously inscribed in the first page of *Emile*. But though the writings of Rousseau contain many errors on the most important subjects, they may yet be read with great advantage. There is, perhaps, no writer so capable of inspiring a young mind with an ardent love of virtue, a fixed hatred of oppression, and a contempt for all false glory, as Rousseau; and I ascribe, in a great degree, to the irrational admiration of him, which I once entertained, those dispositions of mind, from which I have derived my greatest happiness throughout life.”

Neither is there any writer so well calculated to inspire a young man just entering life with false views and unfounded expectations.

Mr. Roget marries Miss Romilly, and the first part of the autobiography closes with a touching episodical account of the effects produced by this marriage on an ex-apprentice of the father, named Greenway, who was secretly in love with her:

“My sister certainly felt no affection for him, but she highly esteemed him: his person was agreeable; his temper was even and amiable; and he had an intrinsic goodness of heart, a disinterestedness, a generosity, and a sense of honour, which it

was impossible not to admire. Her heart, too, was at that time disengaged, and, but for the most fatal reserve on his part, he undoubtedly might have obtained for his wife the woman, with whom, as it afterwards appeared, it was impossible for him to live, and to be happy. He remained, however, silent; not an expression ever fell from him which could lead to a discovery of his secret, not even to my brother or myself, in our greatest intimacy. He was a witness to Roget's being introduced into our family; marked the progress which he made in our friendship; observed the first dawning of affection in my sister's breast; watched the sentiments, which she and Roget mutually entertained for each other, growing up into attachment, affection, and the warmest passion; and still observed the most profound silence: and it was not till after the marriage had been resolved on, that any of us discovered the cause of that melancholy which had then long become apparent in him; nor should we, even then, have discovered it, but it would perhaps have passed with him in silence into that grave into which his misfortunes soon led him, but for the most accidental circumstance.

"One night, my brother and myself supped with him, at the house of one of our friends. We stayed very late, and drank a good deal of wine; not enough, however, to produce a visible effect on any of us, but on poor Greenway. On him was produced an effect the most extraordinary: his spirits were not exhilarated, his reason was not clouded, or his articulation impeded; but the passions, which had long preyed upon his mind, heightened and inflamed, overcame at once the restraint which he had long imposed on them, and burst out in the most vehement expression. As we were walking home, he talked in vague terms of his wretchedness, till, unable to proceed, he sunk down on the steps of a door; and there, in a transport of passion, and in words, and with an accent that penetrated to the soul, expressed the cause and extent of his misery; and in a spirit of prophecy, which was but too truly fulfilled, exclaimed, that he should never, never again know what it was to be happy."

The second part is introduced by some reflections on the improvement of his position, since he commenced the narrative:

Tanhurst, August 28, 1813.

"After an interval of seventeen years, I am about to resume the task of writing my life ; a task undertaken in very different circumstances, and with very different views, from those with which I now resume it. When I began to set down the few events of my unimportant history, I was living in great privacy, I was unmarried, and it seemed in a very high degree probable that I should always remain so. My life was wasting away with few very lively enjoyments, and without the prospect that my existence could ever have much influence on the happiness of others ; or that I should leave behind me any trace by which, twenty years after I was dead, it could be known that ever I had lived. But since that period, and within the last few years, I have been in situations that were more conspicuous ; and though it has never been my good fortune to render any important service, either to my fellow-creatures or to my country, yet, for a short period of time, at least, some degree of public attention has been fixed on me. It is, however, with no view to the public that I am induced to preserve any memorial of my life ; but wholly from private considerations. It is in my domestic life that the most important changes have taken place. For the last fifteen years, my happiness has been the constant study of the most excellent of wives ; a woman in whom a strong understanding, the noblest and most elevated sentiments, and the most courageous virtue, are united to the warmest affection, and to the utmost delicacy of mind and tenderness of heart ; and all these intellectual perfections are graced and adorned by the most splendid beauty that human eyes ever beheld. She has borne to me seven children, who are living ; and in all of whom I persuade myself that I discover the promise of their, one day, proving themselves not unworthy of such a mother. Some of them are of so tender an age that I can hardly hope that I shall live till their education is finished, and much less that I shall have the happiness to see them established in life ; and of some it is not improbable that I may be taken from them while they are yet of such tender years that, as they advance in life, they may retain but little recollection of their father. To these, and even to my dear wife, if, as I devoutly wish, she should many years survive me, it may be a source of great satisfaction

to turn over these pages, to learn or to recollect what I was, what I have done, with whom I have lived, and to whom I have been known. Such is the information that these pages will afford, and they will, I fear, afford nothing more. Of instruction there is but little that they can supply: what to shun or what to pursue, is that of which a life, so little chequered with events as mine, can hardly present any very striking lessons. I have been in no trying situations; the force of my character has never been called forth; I have fallen into no very egregious faults; and I have had the good fortune to escape those situations which generally lead to them; but, from the pious affection which may have been instilled into my children's minds, they may set a considerable value, and take a lively interest in facts which, to the rest of mankind, must appear altogether insipid and indifferent. It is, therefore, to enjoy conversation with my children, at a time when I shall be incapable of conversing with any one; and to live with them as it were, long after I shall have descended into the grave, that I proceed with this narrative of my life. It is surrounded by these children in their happy infant state; cheered with the little sallies of their wit; exhilarated with their spirits; become youthful, as it were, by their youth; and transported at sometimes discovering in them the dawnings of their mother's virtues; it is in the repose of a short period of leisure after unusual fatigues in my profession; it is in a fine season, in the midst of a beautiful country, with some of the richest and most luxuriant scenes of nature spread before me: it is in the midst of all these sources of enjoyment and of happiness, that I sit down to this pleasing employment."

This is a curious tone for a man who had succeeded beyond his warmest expectations, and was next in nomination for the Chancellorship in the case of a change of ministry. Nor must it be set down exclusively to the inherent modesty of his disposition. The fact is, he never took a just pride in his profession, or set much value on its honours, though he tells us that his early ardour was kindled by Thomas's *Eloge* of Daguesseau.

"When my former narrative broke off, I think (for I have it not at this moment before me) I was serving Mr. Lally as his articled clerk. I had never, during my clerkship, thought

very seriously of engaging in the line of the profession for which that noviciate was intended to qualify me. To distinguish myself in some literary career was the chimerical hope which I had long indulged; and I had once even supposed that I might become illustrious as a poet; but this delusion was not of long duration. The important moment, however, had arrived when it was necessary to come to a decision, upon the prudence or folly of which my future fate was to depend. The encouragement I had received from Roget had very strongly inclined me not only to continue in the profession, but to look up to a superior rank in it; and although I had yet taken no step whatever towards such an object, I could not, now that it was requisite to decide, persuade myself to decide against it. With the exception, however, of Roget, I believe most of my friends thought it a hazardous and imprudent step; Mr. Lally deemed it so in a very high degree. He did not, indeed, undervalue my talents, though I believe he did not rate them very high; but he thought my diffidence invincible, and such as must alone oppose an insurmountable bar to my success. What principally influenced this decision was, that it enabled me to leave in my father's hands my little fortune (the 2000*l.* legacy), and the share of the residue (perhaps 700*l.* or 800*l.* more) which Mr. De la Haize had left me; and which I knew it would be very inconvenient to him that I should call for; but which would have been indispensably necessary, if I had purchased a sworn clerk's seat, 2000*l.* being about the price which it would cost. This consideration, I am sure, had no weight with my father in his acquiescing in my resolution; but it was decisive with me in forming it: and it is not the only instance of my life in which a decision, which was to have most important consequences, has been taken principally to avoid a present inconvenience. Even with a view, however, to my father's pecuniary circumstances, the determination I took was hardly to be justified: because, however inconvenient to him the immediate payment of the money might have been, yet it would have secured to me, without the possibility of risk, an income much larger than I had then occasion for; and with which I might, in the course of a few years, have replaced as large or a larger sum in his hands. The course

of life I was entering upon, on the contrary, insured expense ; and postponed all prospect of profit certainly for five years, and probably for a much longer period. At a later season of my life, after a success at the bar which my wildest and most sanguine dreams had never painted to me ; when I was gaining an income of 8000*l.* or 9000*l.* a year ; I have often reflected how all that prosperity had arisen out of the pecuniary difficulties and confined circumstances of my father. There was another circumstance, which, though a trifling one, I ought to mention ; for it certainly had some, though I cannot at this distance of time recollect how great an influence over the judgment which I exercised. The works of Thomas had fallen into my hands : I had read with admiration his *Eloge* of Daguesseau ; and the career of glory, which he represents that illustrious magistrate to have run, had excited to a very great degree my ardour and my ambition, and opened to my imagination new paths of glory."

He was in his twenty-first year when he entered at Gray's Inn. He took a set of chambers overlooking the gardens, arranged his books about him, and "began with great ardour the *painful* study of the law." By Mr. Lally's advice he at once became the pupil of a chancery draftsman, Mr. Spranger, who had hardly practice enough to afford the necessary quantity of employment ; but Romilly speaks with gratitude of his kindness and attention, and says that he found no reason to repent of the connection. The only hint we get regarding his plan of study is the following :

"As I read, I formed a common-place book ; which has been of great use to me, even to the present day. It is, indeed, the only way in which law reports can be read with much advantage."

He is more communicative as to his general reading :

"It was not, however, to law alone that I confined my studies. I endeavoured to acquire much general knowledge. I read a great deal of history ; I went on improving myself in the classics ; I translated, composed, and endeavoured (though I confess with a success little proportioned to the pains I took) to form for myself a correct and an elegant style ; I translated the whole of Sallust, and a great part of Livy, Tacitus, and Cicero ; I wrote political essays, and often sent

them without my name to the newspapers, and was not a little gratified to find them always inserted : above all, I was anxious to acquire a great facility of elocution, which I thought indispensably necessary for my success. Instead, however, of resorting to any of those debating societies which were at this time much frequented, I adopted a very useful expedient, which I found suggested in Quintilian ; that of expressing to myself, in the best language I could, whatever I had been reading ; of using the arguments I had met with in Tacitus or Livy, and making with them speeches of my own, not uttered, but composed and existing only in thought. Occasionally, too, I attended the two Houses of Parliament ; and used myself to recite in thought, or to answer the speeches I had heard there. That I might lose no time, I generally reserved these exercises for the time of my walking or riding ; and, before long, I had so well acquired the habit of it, that I could think these compositions as I was passing through the most crowded streets."

His very close application proved at last injurious to his health, which was also affected by anxiety regarding his sister. Her husband, Mr. Roget, was seized with a violent inflammation of the lungs, accompanied with spitting of blood, and, as a last resource, his physicians had ordered him to try the air of his native place, Geneva. He set out in such a state that it was doubtful whether he would ever reach his destination ; and Romilly was kept in constant apprehension lest his sister should be left unprotected in a foreign country.

His own physician advised him to try the waters of Bath, and he did try them for six weeks. Unluckily, a law library was sold by auction soon after his arrival there ; he made several purchases, and renewed his studies. At the same time, he drank too freely of the water, and took his baths too hot. He got worse, and returned to town in the most appalling state of despondency,—convinced that he was destined to drag on a useless and burdensome existence, and even entertaining fears that his disorder might end in madness. Sir William Watson, his town physician, applied the more obvious remedies. He made him use the cold bath, and drink the chalybeate waters of Islington. He was also recom-

mended to relinquish all study for a time ; “ but this recommendation,” adds Romilly, “ was unnecessary, for my constant restlessness and uneasiness made it impossible for me to fix my attention upon any thing.”

He was gradually getting better, when the Gordon riots compelled him to enrol himself in one of the volunteer corps established for the protection of the inns of court.

“ The state of my health rendered me quite unequal to so great an exertion. I was ashamed, however, of being ill at such a season. I did therefore as others did ; was up a whole night under arms, and stood as sentinel for several hours at the gate in Holborn.

“ This fatigue, and the excessive heat of the weather, threw me back into a worse state of health than ever. I was so relaxed that I could hardly stand ; I had, from mere weakness, continual pains in all my limbs. My nights were restless ; and if the continual agitation of my fibres would have permitted me to sleep, the pulsation of my heart, which was continually sensible to me, and which was visible through my clothes when I was dressed, would have prevented me. I hurried out of town to try the effect of sea air ; found myself worse, and hastened back again.”

He was compelled to give up his regular studies altogether for a time, but by way of diversion he began to read Italian, and found, he says, considerable entertainment in the novelties which the literature of Italy presented to him. His complete recovery was effected by a journey to Geneva, which his affection for his sister, more than any expectation of personal advantage, induced him to undertake.

The Rogets had left their only child, an infant in arms, in England, but finding their return indefinitely postponed, they were anxious to have him with them. Mr. Romilly, senior, had become doatingly fond of his grandson, and positively refused to trust him to the care of strangers or servants for so long a journey. To smooth away this difficulty, Romilly volunteered to go by way of escort to the nursery-maid ; and they started with a *voiturier*, who undertook to carry them by easy journies of thirty miles a day to Switzerland. This mode of travelling, by affording opportunities of seeing remarkable objects and so diverting his thoughts from his

own state of mind and body, exercised the most beneficial influence on both. He had become quite a new man by the time he reached Lausanne, and the conversations he there had with Mr. Roget soon freshened up the spirit of self-reliance which sickness had subdued. He passed a month at Geneva, where he mixed freely in society, and got acquainted with several persons who subsequently became famous or notorious, as Chauvet, Duroveray, Clavière, Reybaz, and Dumont. The last became permanently connected with him; and we shall therefore quote the passage in which the commencement of this intimacy is commemorated:

“During this residence at Geneva, I formed a friendship with a young man about my own age, of the name of Dumont, who was then studying for the church, and was soon after admitted one of its ministers. Roget, who had been long acquainted with him, had spoken to each of us in such favourable terms of the other, that we were desirous of becoming friends before we had met; and a personal acquaintance, improved by a little tour we made together to the glaciers of Savoy, and round the lake of Geneva, by the Tête Noire, Martigny, Bex, and Vevey, was soon matured into a very intimate and firm friendship, which remains to this day, increased and strengthened by the number of years during which it has lasted. His vigorous understanding, his extensive knowledge, and his splendid eloquence, qualified him to have acted the noblest part in public life; while the brilliancy of his wit, the cheerfulness of his humour, and the charms of his conversation, have made him the delight of every private society in which he has lived: but his most valuable qualities are his strict integrity, his zeal to serve those whom he is attached to, and his most affectionate disposition.”

After making a short excursion to La Grande Chartreuse, he returned by the way of Paris, where he formed an acquaintance with d’Alembert, Diderot, and some other persons of note. Our object being to extract the best account of his career as a lawyer, we pass over his description of what he saw in Paris, with the exception of a single passage:

“The other valuable acquaintance which I have said that I formed at Paris was that of Madame Dolessert, one of the most benevolent and amiable of women. She was from

Switzerland ; was, as long as Rousseau saw any body, one of his best friends ; and it is to her that were addressed the charming Letters on Botany which, since his death, have been published. She had a large collection of other letters from him, of some of which she permitted me to take copies. At her country house at Passy, in her society, and in that of her amiable daughter, then a girl of fifteen, of a very agreeable person and of a very cultivated understanding, I spent most usefully the time I passed at Paris. *There is nothing, indeed, by which I have through life more profited than by the just observations, the good opinion, and the sincere and gentle encouragement of amiable and sensible women.*"

Soon after his return he published an account of the (then) late political events at Geneva, written upon the spot.

The following tribute to an early friend well merits attention :

"There was a young man of my own age, a student and an inhabitant of Gray's Inn, with whom I about this time formed a great degree of intimacy. His great talents, and his learning as a classical scholar, as an English antiquary, and as a profound lawyer, must, if he had lived, have raised him to very great eminence in his profession ; *though his honest and independent spirit would probably to him have barred all access to its highest offices.* This was John Baynes. He was a native of the West Riding of Yorkshire ; had received his early education at Richmond in that county ; and had afterwards very much distinguished himself both in mathematics and in the classics in the University of Cambridge, where he became a fellow of Trinity College. A man more high-spirited, more generous, more humane, more disposed to protect the feeble against the oppression of the powerful and the great, never adorned the annals of England. His premature death, which happened five or six years after the time I am speaking of, I have always considered as a very great public loss. To our profession, particularly, the loss of such a man, and in such a state of the profession as that in which it happened, was the greatest that it could suffer. The intimacy which I formed with this excellent man soon ripened into the firmest friendship. We prosecuted our studies together ; we communicated to each other, and compared the notes which we took

during our attendance in the courts. We used to meet at night at each other's chambers to read some of the classics, particularly Tacitus, in whom we both took great delight; and we formed a little society, to which we admitted only two other persons, Holroyd and Christian, for arguing points of law upon questions which we suggested in turn. One argued on each side as counsel, the other two acted the part of judges, and were obliged to give at length the reasons of their decisions; an exercise which was certainly very useful to us all."

The sentence printed in italics, written in 1813, after Romilly himself had filled one of the highest offices, is one of those which induce us to doubt alike the soundness of his judgment, the strength of his understanding, and his insight into character. Almost all young men of spirit begin life with the same professions—and we believe honest professions—of independence. Come what come may, no earthly consideration shall induce them to surrender one iota of a principle; and if governments require their services, they must adopt new modes of governing. But this austerity gradually wears off as they mingle with mankind, or marry and get children; the necessity of party unions and mutual concessions is admitted, and the standard of public virtue grows lower and lower, till the stern uncompromising patriot or philanthropist settles down into a solicitor-general or a judge. We will answer for it that the majority of the judges since seated on the bench were as honest and independent as John Baynes himself, though guilty of the inconsistency of accepting the promotion they had earned. Sir Samuel Romilly had lived long enough to learn this, and he had no right whatever, in the evening of his days and the fullness of his authority, to lay down a criterion which casts an implied censure on the best of his contemporaries, and must have the tacit effect of preventing the men best qualified to serve the state from serving it.

Romilly was called to the bar on the last day of Easter term, 1783, but the death of Mr. Roget compelled him to make another journey for Lausanne, and prevented him from joining a circuit till the next year. His friend Baynes accompanied him as far as Paris, where they saw and conversed with Dr. Franklin. At Lausanne he was introduced to the Abbé Raynal, whose conversation, he says, "was certainly so

inferior to his celebrated work, as to give much countenance to the report which has been very common, that the most splendid passages in it were not his own." This again is a very careless and erroneous style of inference. A man of sluggish temperament, slow perceptions, or retiring character, broods over a subject till his imagination warms and his style kindles into eloquence. Because he cannot reproduce the same state of thought and feeling on the spur of the moment, or does not think it worth his while to show off on subjects which had been the study of his life before an obscure law-student, he is to be deemed guilty of the most improbable description of plagiarism ! What sort of judgment would Sir Samuel have passed on Corneille or Addison ?

When he joined the profession it was customary for the equity bar to go circuits and attend sessions till their town business confined them to their own courts. He followed the usual course :

" Thus was my first long vacation passed. By Michaelmas term I had returned to business, or rather to attend the courts, and to receive such business as accident might throw in my way. I had endeavoured to draw Chancery pleadings before I was called to the bar, as an introduction to business when I should be called. In that way, however, the occupation I got under the bar was very inconsiderable ; but soon after I was admitted to the bar I was employed to draw pleadings in several cases. This species of employment went on very gradually increasing for several years ; during which, though I was occupied in the way of my profession, I had scarcely once occasion to open my lips in court.

" In the spring of 1784 I first went upon the circuit. All circuits were indifferent to me, for I had no friends or connections on any one of them ; and my choice fell upon the Midland, because there appeared to be fewer men of considerable talents or of high character as advocates upon it than upon any other, and consequently a greater opening for me than elsewhere. It was besides shorter than some other circuits, and would therefore take me for a less time from the Court of Chancery ; and, what was no unimportant consideration, my travelling expenses upon it would be less. The circuit did not, indeed, when I joined it, appear to be overstocked with talent.

At the head of it, in point of rank, though with very little business, was Serjeant Hill; a lawyer of very profound and extensive learning, but with a very small portion of judgment, and without the faculty of making his great knowledge useful. On any subject on which you consulted him, he would pour forth the treasures of his legal science without order or discrimination. He seemed to be of the order of lawyers of Lord Coke's time, and he was the last of that race. For modern law he had supreme contempt; and I have heard him observe that the greatest service that could be rendered the country would be to repeal all the statutes, and burn all the reports which were of a later date than the Revolution. Next to him in rank, but far before him in business, and indeed completely at the head of the circuit, stood * * * *; who, without talents, without learning, without any one qualification for his profession, had, by the mere friendship, or rather companionship, of Mr. Justice * * *, obtained the favour of a silk gown; and by a forward manner, and the absence of commanding abilities in others, had got to be employed in almost every cause. The merits of a horse he understood perfectly well; and when in these, as sometimes happened, consisted the merits of a cause, he acquitted himself admirably; but in other cases nothing could be more injudicious than his conduct. In spite however of his defects, and notwithstanding the obvious effects of his mismanagement, he continued for many years, while I was upon the circuit, in possession of a very large portion of business. The other men in business on the circuit were Daysell, Balguy, Parker, Coke, Clarke, White, Gally, and Sutton (afterwards Lord Manners, and Chancellor of Ireland); none of them very much distinguished as lawyers or as advocates. There were, besides, some young men without business, and who seemed to have little prospect of ever obtaining it; George Isted, Rastal, Aufrere, Skrine, Gough, Shipston, Tom Smith, and some others whose names I may probably have forgotten. The society of the circuit was not very much to my mind, but I formed in it a friendship with several men whom I highly valued. Of these, however, Gally and Sutton were the principal; the others joined the circuit some years after I had entered upon it."

He was induced by the amiable motive of obliging an old

female servant, whose kindness to him when a boy is affectionately commemorated, to take as his clerk a silly, drunken, absurd old fellow, who was constantly exposing both his master and himself to ridicule. This worthy once manifested his gratitude in a manner as original as himself :

“ I had, sometimes, employed him to copy papers which I had amused myself with writing upon abuses existing in the administration of justice, and upon the necessity of certain reforms. He had seen with great regret the little progress I had made in my profession, and particularly upon the circuit, and had observed those whom he thought much my inferiors in talents far before me in business ; and, putting these matters together in his head, he entertained no doubt that he had, at last, discovered the cause of what had long puzzled him. The business of a barrister depends on the good opinion of attorneys ; and attorneys never could think well of any man who was troubling his head about reforming abuses when he ought to be profiting by them. All this he, one day, took the liberty of presenting to me with great humility. I endeavoured to calm his apprehensions, and told him that what I wrote was seen only by himself and by me ; but this, no doubt, did not satisfy him.”

The society of the circuit was subsequently improved by the addition of some recruits, amongst whom Ascough, Perceval, and Bramston are singled out. The notice of Perceval is evidently tinged with political, not to say party, feelings :

“ He (Ascough) was cheerful, warm, friendly, and was a great acquisition to the society of the circuit. So, too, was Perceval ; with much less, and indeed with very little reading, of a conversation barren of instruction, and with strong and invincible prejudices on many subjects ; yet, by his excellent temper, his engaging manners, and his sprightly conversation, he was the delight of all who knew him. I formed a strong and lasting friendship with both these men. Poor Ascough died of a consumption a short time after I was married ; and Perceval, after he had, in a manner which my private friendship for him could never induce me to consider in a favourable point of view, obtained the situation of prime minister, and quite to the moment of his tragical end, was desirous that our friendship should remain uninterrupted : I could not, how-

ever, continue in habits of private intimacy and intercourse with one whom in public I had every day to oppose. Bramston had the good humour and the friendly disposition of the other two, and his conversation was likewise very engaging. Many very happy hours have I passed in this society ; particularly when we could contrive for a day to get away from the circuit, either at Matlock, or at our friend Digby's, at Meriden, in Warwickshire."

The next passage does not admit of compression :

" This sort of amusement, however, was for a considerable time the only profit that I derived from the circuit. Many of the barristers upon it had friends and connexions in some of the counties through which we passed, which served as an introduction of them to business ; but for myself, I was without connexions every where : and at the end of my sixth or seventh circuit, I had made no progress. I had been, it is true, in a few causes ; but all the briefs I had had were delivered to me by London attorneys, who had seen my face in London, and who happened to be strangers to the juniors on the circuit. They afforded me no opportunity of displaying any talents, if I had possessed them, and they led to nothing ; I might have continued thus a mere spectator of the business done by others, quite to the end of the sixteen years which elapsed before I gave up every part of the circuit, if I had not resolved, though it was very inconvenient to me on account of the business which I began to get in London, to attend the quarter sessions of some midland county. There is, indeed, a course by which an unconnected man may be pretty sure to gain business, and which is not unfrequently practised. It is to gain an acquaintance with the attorneys at the different assize towns, to show them great civility, to pay them great court, and to affect before them a display of wit, knowledge, and parts. But he who disdains such unworthy means may, if he do not attend the quarter sessions, pass his whole life in travelling round the circuit, and in daily attendances in court, without obtaining a single brief. When a man first makes his appearance in court, no attorney is disposed to try the experiment whether he has any talents ; and when a man's face has become familiar by his having been long a silent spectator of the business done by others,

his not being employed is supposed to proceed from his incapacity, and is alone considered as sufficient evidence that he must have been tried, and rejected. It was an observation, indeed, which I heard Mr. Justice Heath make, 'that there was no use in going a circuit without attending sessions,' which determined me to try the experiment, and I fixed on Warwick as being the last place upon the commission, and therefore that part of it which I could attend with the least interruption of my business in chancery, and as being also the place at which at that time the greatest number of causes were tried. At the sessions there is a much less attendance of counsel than at the assizes; and from the incapacity for business of many who do attend, every man is almost certain of being tried; and if he has any talents, of being a good deal employed. I found the experiment very successful: I had not attended many sessions before I was in all the business there; this naturally led to business at the assizes, and I had obtained a larger portion of it than any man upon the circuit, when my occupations in London forced me altogether to relinquish it: this, however, was at a period long subsequent to that to which I have brought down my narrative.

"The increase of my business in town was so regular and considerable, as to make it evident that I ought principally to rely upon it, and that the circuit should be made a matter of very subordinate consideration. It was, indeed, more for the sake of cultivating the habit of addressing juries, of examining and cross-examining witnesses, and of exercising that presence of mind which is so essential to a *nisi prius* advocate, and which I thought might be of great use to me in the higher stations of the profession to which I began to aspire, than on account of the emolument I might derive from it, that I remained on the circuit."

Lord Brougham quotes an observation of some high legal authority to this effect: that a man can only get on by sessions, by special pleading, or by a miracle. But special pleading must have been followed long enough to try the constitution of a horse; and it is almost as difficult to get business at the few sessions which are likely to lead to any thing as on the circuit. We very much fear, therefore, that a

high spirited or delicate minded man who has no legitimate connection amongst the brief distributors, has little to depend upon but the miracle; and hundreds at the present moment must be ready to exclaim that, though the knot may be worthy of the god, the god is very slow in coming.

Romilly, however, if tradition speaks true, was unluckily tried and found wanting at the very commencement of his career in a quality peculiarly open to remark. His natural diffidence had never been corrected by the habit of addressing an audience: the *partie carrée* (Baynes, Holroyd, Christian, and himself) proved an insufficient substitute for a court, and on his first public appearance he suffered so painfully from embarrassment, that his old master, Lally, is said to have prognosticated his complete failure. Long afterwards, when the habit of thinking on his legs (the real secret, and only to be got by practice) was perfectly acquired, he was often known to tremble and hesitate at the commencement of a speech. This peculiarity, if it can be called one, he shared in common with the greatest orators, and we incline to think that few men of ardent sensibility or eager excitable temperament, are ever altogether free from it.

This is all we find regarding his professional progress in the narrative; the letters and diary furnish no materials for filling up the blank, and we can learn little from private sources but what is generally known already. He first began to acquire distinction as a leader about 1797: in 1799, Lord Eldon's promotion to the bench added greatly to his practice: in 1800, he obtained a silk gown, and from that period he may be regarded as one of the undisputed leaders of the Court.

His appointment as solicitor-general is commemorated at the commencement of the diary:

"Feb. 8th (1806). I this day received information from Mr. Fox, that I was appointed to the office of solicitor-general.

"This is the commencement of my public life. May I (though it is more than I dare expect or hardly hope for) be as happy in it as I have hitherto been in privacy and obscurity. I have determined to keep a journal of all those transactions of my life, which can be of any importance to the public or to myself. I may hereafter probably find it very useful to ascertain past events with more accuracy than a memory so defective as mine could enable me to

do; and in recording every day the acts of my life, I shall be compelled to reflect on them, and on the motives by which I have been actuated, and, as it were, to pass a judgment on my conduct before it is too late for any self-confession to be of use.

"My appointment has not only been unsolicited, but it has been made without connexion with either Lord Grenville or Mr. Fox, by whom the administration has been formed. I owe it principally, I believe, to the Prince of Wales. After the king had sent for Lord Grenville and had directed him to form a new administration, Colonel M'Mahon called on me, and informed me, that he had the prince's commands to say to me, that he had told both Lord Grenville and Mr. Fox, that it was his particular wish that I should hold some office in the administration that was to be formed. I have certainly never paid my court in any way to the prince. His royal highness was kind enough, not many months ago, to offer me a seat in parliament, which I very respectfully, but very decidedly declined."

Strange that the really high-minded independent patriot, the friend of Dumont and Mirabeau, the advocate of popular rights, and the sceptical inquirer into the compatibility of principle with place, should have been indebted for the only office of importance he ever filled to the personal predilections of a prince!

"12th. I was this day sworn in, together with Piggott, the new attorney-general, and we attended the levee at the queen's house, and kissed the king's hand on our appointment. His majesty was pleased to knight us both, greatly against our inclination. Never was any city trader, who carried up a loyal address to his majesty, more anxious to obtain, than we were to escape, this honour. We applied to Lord Dartmouth, the lord in waiting, to Lord Grenville, Lord Spencer, and every body on whom we thought it might depend, to deprecate the ceremony which awaited us. But the king was inflexible. For the last twenty years of his reign, it has pleased his majesty to knight all attorneys and solicitors general and judges on their appointment, though for the first five and twenty years he had never seen the necessity or propriety of it; and now, every man who arrives at these situations must submit to the humiliation of having inflicted on him that which is called, but is considered neither by himself nor any other person an honour. Perceval, the last attorney-general, had been permitted to decline knighthood because he was an earl's son."

Knighthood naturally becomes ridiculous when it is indiscriminately conferred without reference to the fitness of things, but legal knights are as much respected as ever, and we own it strikes us as an undue affectation in judges and law officers to shrink from it. Besides, it is the only mode of enabling their wives to participate in their rank, and complaints are often made that the wives of ecclesiastical dignitaries are not similarly distinguished from the crowd. It is generally a sour, envious, unphilosophical disposition which sees anything to despise or carp at in the old established designations or appendages of rank.

The appointment of Erskine to the chancellorship is condemned in the strongest terms in the diary, though he endeavoured to anticipate censure by a frank avowal of incapacity :

“ He called on me a few days ago, and told me that he should stand in great need of my assistance, that I must tell him what to read, and how best to fit himself for his situation. ‘ You must,’ these are the very words he used to me, ‘ you must make me a chancellor now, that I may afterwards make you one.’ ”

A piece of information, conveyed in a note, will be new to most of our readers :

“ Before the Great Seal was given to Erskine, it had been offered to each of the two chief justices. Mansfield declined it on account of his age ; and Lord Ellenborough, because his office is almost as lucrative, and is held for life, and perhaps because, being unaccustomed to courts of equity, he thought himself unfit for the office.”

The administration were to bring both their law-officers into parliament free of expense, and we see nothing in Romilly's acceptance of a seat in this manner inconsistent with his former refusal to accept of a seat from Lord Lansdowne or the Prince of Wales, in allusion to which he says :

“ I weighed the offer very maturely, and in the end I rejected it. I persuaded myself that (although that were not the case with others) it was impossible that the little talents which I possessed could ever be exerted with any advantage to the public, or any credit to myself, unless I came into parliament quite independent, and answerable for my conduct to God and to my country alone. I had felt the temptation so strongly, that in order to fortify myself against any others of the same kind, I formed to myself an unalter-

able resolution *never*, unless I held a public office, to come into parliament but by popular election, or by paying the common price for my seat. As to the first of these, I knew, of course, that I must never look for it; and as for the latter, I determined to wait till the labours of my profession should have enabled me to accomplish it without being guilty of any great extravagance."

But we are puzzled to reconcile the rule here laid down, with his acceptance of a seat from the Duke of Norfolk, who, in 1812, was permitted to bring him in for Arundel:

"I had formerly determined never to come into parliament but by a popular election, or upon the purchase by myself of a seat from the proprietor of some borough, and I refused an offer which the late Marquis of Lansdowne made me, to come in for Calne, a great many years ago; and more recently (in 1805) I declined accepting a seat which the Prince of Wales had procured for me. The alteration, however, which has taken place in the law, and the change in my own situation, have made that quite unobjectionable to which there appeared to me formerly to be the strongest objection. Since Curwen's Bill has declared illegal the purchase of seats in the manner which was formerly practised, there is no choice for a person like myself, but to come into parliament on such an offer as is now made me, or to decline parliament altogether, and I cannot think it is my duty to decline it. The objection to coming into parliament upon the nomination of some nobleman or other great landed proprietor, is, that you come in shackled with his political opinions and subservient to his will; but after the part that I have already acted in parliament, no doubt can be entertained that the Duke of Norfolk is quite sincere in telling me that I shall be quite independent of him; and no person will, I believe, suspect me of intending to speak and vote on any question merely as the duke may wish, and not according to my own judgment and conscience."

That there was no choice for a person like himself &c., is a curious declaration for a person who had just been standing for Bristol, and afterwards sat for Westminster; nor, we should have conceived, was an express statute needed to convince a man of Sir Samuel Romilly's mode of thinking, that the purchase of seats in parliament was illegal or unconstitutional at least; and as to the diminished chance of his being suspected of subserviency, a proper feeling of self-respect would surely have enabled him to despise such suspicions at

any time. May not an honest man rely upon his private character? or must he vote and make speeches before he ventures to take credit for integrity? We should like to have heard Mr. Baynes' opinion on this subject. Moreover, in 1807, he writes :

“ This buying of seats is *detestable* ; and yet it is almost the only way in which one in my situation, who is resolved to be an independent man, can get into parliament. To come in by a popular election, in the present state of the representation, is quite impossible ; to be placed there by some great lord, and to vote as he shall direct, is to be in a state of complete dependence ; and nothing hardly remains but to owe a seat to the sacrifice of a part of one's fortune. It is true that many men who buy seats, do it as a matter of pecuniary speculation, as a profitable way of employing their money : they carry on a political trade ; they buy their seats and sell their votes. For myself, I can truly say that, by giving money for a seat, I shall make a sacrifice of my private property, merely that I may be enabled to serve the public. *I know what danger there is of men's disguising from themselves the real motives of their actions* ; but it really does appear to me that it is from this motive alone that I act.”—vol. ii. p. 201.

A very good argument for Mr. Canning or Lord Castlereagh, but savouring a little, in a man like Romilly, of his friend Mirabeau's favourite maxim : *La petite morale est toujours l'ennemie de la grande.*

In 1805 the Chancellorship of Durham having been vacated by Mr. Baron Sutton, who did not think it compatible with his situation as a judge notwithstanding the precedents of Yates and Willes, was conferred in a very pleasing manner on Romilly. The bishop, with whom he was but slightly acquainted, came down to him below the bar of the House of Lords after the business he was engaged in was concluded, and offered him the appointment, “ with many compliments more flattering than the offer itself.” The emoluments were slight, but the office is one which lawyers of superior rank had not thought themselves at liberty to refuse ; and he was desirous of trying how he should sit and feel in a judicial situation. His account of his arrival and reception at Durham is highly characteristic :

“ But though a chancellor of Durham has not the comfort of reflecting that his services are of much public utility, he may, if he be fond of such things, enjoy the grandeur and magnificence and homage which attend him. The castle of Durham, the episcopal palace, is, when the chancellor arrives, given up to him by the bishop. It is his house; the servants attend upon him as the lord of it; a costly dinner is given to the dignitaries of the church, to the counsel, the officers of the court, and the neighbouring gentlemen; and this, though at the bishop's expense, is, by a kind of legal fiction, considered as the chancellor's dinner. The invitations are sent in his name; he presides at the table; and when the bishop is at Auckland, the chancellor invites and receives him as his guest. Though I was in some degree prepared for this, I could not, upon my arrival at Durham, but feel very forcibly the ridicule of all this mimic grandeur. It was night when we got there, for my dear Anne, who had been accompanying me on a short and hasty tour to the Lakes of Cumberland, was with me. We found that we had been long expected; and as we drove through the gates into the spacious court, and the porter sounded the great bell, we saw the servants hurrying out with lights. In the midst of bows and compliments, and by numerous attendants, we were conducted through long lighted galleries into a drawing-room, where some of the officers of the court and their wives were waiting to receive us, and ‘My Lord’ and ‘Your Honour,’ ushered in every phrase that was uttered. So sudden a transformation into a great man, and the lord of an old feudal palace, reminded me of Sancho's government of Barataria; and still more of Sly, the drunken cobbler of Shakspeare. But to me all this ceremonial was not more ridiculous than it was irksome. The necessity of making conversation with persons I had never seen before, and presiding at table and doing the honours of a great dinner, were to me so disgusting and painful, that the experience of two tedious days passed at Durham would have been sufficient to cure me of all ambitious desires, if I could have imagined that the duties of a chancellor of England bore any resemblance to those of a chancellor of Durham.”

—vol. ii. p. 112—114.

Here we see the cap and cloak of the disciple of Geneva peeping out from under the full-bottomed wig and ermined robe of the English judge. A man of equal sense, gifted with a little more imagination, might have had a very different class of associations suggested to him: the princely bishops of the olden time overawing the rude border barons,

and affording a place of refuge from their rapacity—distributing justice, encouraging learning, and dispensing hospitality. The time for such things has passed away, but there is always something to venerate in the remains of customs or institutions which once blended grandeur with utility.

Sir Samuel Romilly continued solicitor-general rather more than one year (from February, 1806, to March, 1807). He reflects with satisfaction that he had not asked a single favour of the ministry, not even a nomination to the Woolwich Academy for his nephew, which he was extremely anxious to obtain. During his short official life, he carried a bill for the amendment of the bankrupt law, and used his best exertions to carry one for making freehold estates assets. He took no steps for the improvement of the criminal law, though the subject was constantly occupying his thoughts. It appears (vol. ii. p. 229) that he originally contemplated nothing more than to give compensation to persons wrongfully accused of felonies, and in cases of offences made capital according to the value of the thing stolen, to raise the money standard in proportion to the alteration which has taken place in the value of money since the offence was constituted. A distinguished lawyer, now upon the bench, was the first to suggest the more extended plan.

“ During the short time that I was out of Parliament, I regretted very much that I had made no attempt to mitigate the severity of the criminal law. It appeared to me that merely to have brought the subject under the view of the public, and to have made it a matter of parliamentary discussion, would, though my motion had been rejected, have been attended with good effects. On coming again into Parliament, therefore, I determined to resume my original design. In the meantime, I had some conversation on the subject with my friend Scarlett; and he had advised me not to content myself with merely raising the amount of the value of property, the stealing of which is to subject the offender to capital punishment, but to attempt at once to repeal all the statutes which punish with death mere thefts, unaccompanied by any act of violence, or other circumstance of aggravation. This suggestion was very agreeable to me. But, as it appeared to me, that I had no chance of being able to carry through the House a bill which was to expunge at once all these laws from the statute book, I determined to attempt the repeal of them one by one; and to begin with the most odious of

them, the Act of Queen Elizabeth, which makes it a capital offence to steal privately from the person of another.

"May 18th, Wed. Having previously given notice of my intention, I this day moved for leave to bring in, first, a bill to repeal the statute of Queen Elizabeth; and, secondly, a bill for granting compensation, in certain cases, to persons tried for felonies and acquitted."

In our thirteenth volume, by way of preface to our review of the First Criminal Law Report, we enumerated all the legislative steps taken for the improvement of the criminal law from 1808 to 1834, the date of that report. It is unnecessary to go over the same ground again. Suffice it to say, that though Romilly succeeded in passing his first bill (48 Geo. 3, c. 129) with comparative facility, almost all the rest had the most dogged opposition to bear up against, and we cannot wonder if he occasionally loses temper with his antagonists. Yet surely much too sweeping and grave a conclusion is founded on such an incident as the following, which proves little more than that the members of the legislature were not exempt from the convivial failings of their day :

"If any person be desirous of having an adequate idea of the mischievous effects which have been produced in this country by the French Revolution and all its attendant horrors, he should attempt some legislative reform, on humane and liberal principles. He will then find, not only what a stupid dread of innovation, but what a savage spirit it has infused into the minds of many of his countrymen. I have had several opportunities of observing this. It is but a few nights ago, that, while I was standing at the bar of the House of Commons, a young man, the brother of a peer, whose name is not worth setting down, came up to me, and breathing in my face the nauseous fumes of his undigested debauch, stammered out, 'I am against your bill; I am for hanging all.' I was confounded; and endeavouring to find out some excuse for him, I observed that I supposed he meant that the certainty of punishment affording the only prospect of suppressing crimes, the laws, whatever they were, ought to be executed. 'No, no,' he said, 'it is not that. There is no good done by mercy. They only get worse; I would hang them all up at once.'"

His labours in this walk are not to be estimated by their direct results. It was by the principles he diffused rather than by the measures he carried, that he has entitled himself to the

lasting gratitude of mankind, and every generous mind must cordially have gone with him as he exclaimed—

“ From the spirit which I have seen, I shall not be surprised, and I certainly will not be deterred, by any vote of this night. I am not so unacquainted with the nature of prejudice as not to have observed that it strikes deep root; that it flourishes in all soils, and spreads its branches in every direction. I have observed also, that, flourish as it may, it must, by laws sacred and immutable, wither and decay after the powerful and repeated touch of truth. It was my lot to hear in parliament a negative upon that bill which was intended to deliver this enlightened nation from the reproach of the cruel and disgusting punishment of burning women alive. It was my lot, again and again, to witness in this house the defeat of those wise and humane exertions which were intended to rescue Englishmen from the disgrace of abetting slavery. But the punishment of burning is no more, and Africa is free. No resistance, no vote of this night, shall prevent my again appealing to the good sense and good feeling of the legislature and of the country. If I live another year, I will renew this bill, with the bill for repealing the punishment of death for stealing a few shillings; and, *whatever may be my fate, the seed which is scattered has not fallen upon stony ground.*”

To accompany him through his diary would be to touch on almost every topic of public interest which occurred during one of the most stirring periods of our history. It is well known that he took the liberal (sometimes ultra-liberal) side of all the great questions; but his reflections on past events are neither pointed nor original enough to justify their revival in this place, and his reflections on persons are tinged by an extent of prejudice very difficult to reconcile with the received opinion of his benevolence. He presents a striking and humiliating contrast in this respect to Mackintosh.

The accounts of Sir Samuel Romilly's style of speaking agree in the main, and differ only as to the precise rank to be assigned him amongst orators. Lord Brougham places him very high:—

“ On these things all men are agreed; but if a more distinct account be desired of his eloquence, it must be said that it united all the more severe graces of oratory, both as regards the manner and the substance. No man argued more closely when the understanding was to be addressed; no man de-

claimed more powerfully when indignation was to be aroused or the feelings moved. His language was choice and pure; his powers of invective resembled rather the grave authority with which the judge puts down a contempt or punishes an offender, than the attack of an advocate against his adversary and his equal. His imagination was the minister whose services were rarely required, and whose mastery was never for an instant admitted. His sarcasm was tremendous, nor always very sparingly employed. His manner was perfect, in voice, in figure, in a countenance of singular beauty and dignity; nor was anything in his oratory more striking or more effective than the heartfelt sincerity which it throughout displayed, in topic, in diction, in tone, in look, in gesture."—*Brougham's Statesmen.*

There are passages in his published speeches, most of which are said to have been corrected by himself, which fully justify this description. The last speech which he pronounced in the House of Commons (1818, against a clause in the Alien Bill), was generally regarded, according to the same authority, as unexampled amongst the efforts of his eloquence. We give the peroration :—

" Sir, I do not know what course the House is about to adopt; although, from the eagerness with which the question has been taken up on the other side, I cannot help suspecting what that course will be,—a course utterly unwarrantable as it regards the individuals more immediately concerned, and wholly repugnant to the spirit of all parliamentary proceeding. Deeply involved as our privileges are in the question, yet as this parliament will, in all probability, be dissolved in a very short period, I fear its last act will be an act of signal injustice. Such, however, will be a fit close of the greater part of our proceedings. Apprehending that we are within a few hours of the termination of our political existence, before the moment of dissolution arrives, let us reflect on the deeds for which we have to account.—Let us recollect, that we are the parliament which, for the first time in the history of this country, twice suspended the habeas corpus act in a time of profound peace. Let us recollect, that we are the confiding parliament which intrusted His Majesty's ministers with the authority emanating from that suspension, in expectation that, when it was no longer wanted, they would call parliament together to surrender it into their hands—this his ministers did not do, although they subsequently acknow-

ledged that the necessity of retaining that power had long ceased to exist. Let us recollect, that we are the same parliament which consented to indemnify His Majesty's Ministers for those abuses and violations of the law of which they had been guilty, in the exercise of the authority thus vested in them;—that we are the same parliament which refused to inquire into the grievances stated in the numerous petitions under which our table groaned,—that we turned a deaf ear to the complaints of the oppressed—that we even amused ourselves with their sufferings!—Let us recollect that we are the same parliament which sanctioned the employment of spies and informers by the British government, debasing that government, once so celebrated for good faith and honour, into a condition lower in character than that of the ancient French police.—Let us recollect that we are the same parliament which sanctioned the issuing of a circular letter to the magistracy of the country, by a Secretary of State, urging them to commit and hold to bail for libel before indictment found, and promulgating the opinions of the King's Attorney and Solicitor General as the law of the land. Let us recollect that we are the same parliament which sanctioned the shutting of the ports of this once hospitable nation against unfortunate foreigners flying from persecution in their own country.

“ This, Sir, is what we have done; and we are about to crown the whole by the present most violent and unjustifiable act. Who our successors may be, I know not; but God grant that this country may never see another parliament as regardless of the liberties and rights of the people, and of the principles of general justice, as this Parliament has been.”

A good example of his sarcasm is afforded by his speech on the Indemnity Bill (March 11th, 1818). He is replying to Mr. Bathurst, who had endeavoured to justify the employment of spies by the authority of Chief Justice Eyre:

“ On Hardy's trial, Lord Eyre declared, that it was lawful to send persons to seditious meetings, to take notes of what passed, and that they might afterwards give evidence of what they had seen and heard. This is the extent of what he said. He did not say that it was lawful to send persons, under false characters, to instigate and impel the discontented to the commission of crimes; he did not assert that it was justifiable for men to seduce, to plot and to conspire with, that they might afterwards enrich themselves with the reward of betraying, their fellow-subjects. No! His Majesty's ministers cannot sanction such practices by the authority of Chief Justice Eyre. They cannot justify from any thing which that learned

judge has said, '*the fitting out*,' as it has been well expressed, of persons like Oliver. To him and to Castles, the expression is most applicable. On the trials in Westminster Hall, Castles,—that infamous and detestable character,—that criminal wretch, who had been guilty of polygamy,—who had been guilty of forgery,—who had hanged one accomplice and transported another,—who had been the bully of a brothel,—who had been before employed as a spy,—who, as the persons, against whom he appeared, were proceeding to Spa Fields, had put ammunition into the waggon,—that man, I say, that witness of the government, was '*fitted out*' by the police, that he might come into court like a gentleman, and give evidence that the prisoners at the bar had committed high treason.—His wife also was '*fitted out*,' and sent to Yorkshire, that she might not appear on the trial. This is literally '*fitting out*.'"

The conclusion of this speech is in his best manner :

"Great as the evils are which belong to this measure, when considered by itself, they sink into insignificance, when compared with those which must attend its operation as an example to future ministers and future parliaments. Henceforward a bill of indemnity will be regarded as the natural and necessary consequence of a suspended habeas corpus. One abuse will be the plea in justification of every other. Whatever abuses of authority may occur, however magistrates may violate their duty,—to whatever extent the law may be outraged,—however malicious and unfounded the charges on which the subject shall have been deprived of his liberty,—all these considerations are to be utterly disregarded, because the habeas corpus has been suspended !

"This is to be the law of England in times to come. This proceeding, with the long detail of multiplied sufferings enumerated in the various petitions which lie unheeded or ridiculed on the table of this House, will stand recorded in our history,—exhibiting a character of the present, and a precedent to every future age.—In this disastrous state of things, my only consolation is, that when these cruel and arbitrary measures against the people of England shall be tried hereafter,—when bad precedents shall have led to worse,—when the last traces of liberty shall have vanished,—when the tribunals of law and justice, and all the venerable institutions of our fathers shall have been swept away, or converted into the instruments of despotism and oppression,—when posterity shall drain the dregs of that baleful cup which is preparing for them, and shall reflect with merited bitterness on the source and authors of their wrongs,—my only consolation is, that posterity will also know, that

among the members of this House, there were at least a few individuals who saw and endeavoured to avert the threatened evil,—who, regardless of the overwhelming numbers, and the taunts and exultation with which a confiding majority advanced to their triumph over the constitution, remained at their posts, struggling, vainly struggling to preserve that system of law, justice, and liberty, which has been so long the boast of this country and the envy of surrounding nations.—It has been the good fortune of the ministers of the crown to be engaged in a succession of splendid victories abroad: but they have sullied the lustre of those glories and of their own characters, by a victory over the liberties of their country; and it may now truly be said, in the language of our immortal bard,

“ ‘ That England, that was wont to conquer others,
Has made a shameful conquest of herself.’ ”

His forensic speeches were distinguished by the same qualities whenever the subject gave occasion for their display. The case of *Huguenin v. Baseley* (Nov. 1806), in which a clergyman was accused of inveigling a widow out of her property, gave ample scope for them, and his speech still lives in the traditions of the bar. Lord Brougham says, “ the reply, even as reported in 14 *Vesey, junior*, may give no mean idea of his extraordinary powers.” The concluding passage is highly characteristic:

“ The ground as between guardian and ward, is put upon the danger either of inducing guardians to flatter the passions of their wards, or of the improper exercise of their authority; as the relation of husband and wife is guarded from the effects both of indulgence and severity.

“ If this reasoning has any weight, does not the principle apply with infinitely greater force to the present case? What is the authority of a guardian, or even parental authority, what are the means of influence by severity or indulgence in such a relation, compared with the power of religious impressions under the ascendancy of a spiritual adviser; with such an engine to work upon the passions; to excite superstitious fears or pious hopes; to inspire, as the object may be best promoted, despair or confidence; to alarm the conscience by the horrors of eternal misery, or support the drooping spirits by unfolding the prospect of eternal happiness: that good or evil, which is never to end? What are all other means to these? Are inferior considerations to have so much effect; and is no regard to be given to the most powerful motive, that can actuate the human

mind? Though no direct authority is produced, your lordship, dispensing justice by the same rule as your predecessors, upon such a subject not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart; and decide in a case, far the strongest that has yet occurred, upon this ground alone, from its infinite importance to the community."

A bystander tells us that this speech was delivered in a quiet and natural though earnest tone, occasionally increasing in emphasis; and such was the ordinary character of his elocution.

His published writings are few, and not remarkable for felicity of diction or originality of thought. Their chief merit consists in their conscientiousness. His first essay was a tract on the power of juries in questions of libel, called forth by the Dean of St. Asaph's case, and sent anonymously to the Constitutional Society, who printed and circulated it. This tract gained him the friendship of Lord Lansdowne, at whose request he shortly afterwards published an answer to Madan's "Thoughts on Executive Justice," in which it was contended that, certainty of punishment being essential to the prevention of crime, the penal code, however inhuman, should be rigidly enforced. The sale of the answer was limited, but it greatly added to his reputation amongst his friends.

During his stay in Paris, in 1788, he wrote some remarks on the prison of Bicêtre: these Mirabeau translated and published as his own; and Romilly, on his return to London, printed them in a periodical publication as a translation from Mirabeau. Hardly anything in Mirabeau's strange life is more strange than the influence he exercised over every mind that came in contact with his own. Who would have expected to find so rigid a moralist and uncompromising a lover of truth as Romilly, condescending to gloss over his vices and wink at his charlatanism?

Romilly was also the author of a tract on the French Revolution, as to which his opinions changed with a rapidity which says little for his political foresight. Thus in May, 1792, "Even the conduct of the present assembly has not been able to shake my conviction that it is the most glorious event, and

the happiest for mankind, that has ever taken place since human affairs have been recorded." In the September following, he exclaims, "How could we ever be so deceived in the character of the French nation as to think them capable of liberty! One might as well think of establishing a republic of tigers in some forest in Africa, as of maintaining a free government among such monsters."

If the French were acting like tigers and incapable of liberty, why was he so angry with Napoleon, or why did he refuse Talleyrand's proffered presentation from disgust, "at the eagerness with which the English crowded to do homage at the new court of a usurper and a tyrant?" Neither do we understand upon what principle the restitution of the plunder collected in the Louvre is sweepingly condemned.¹

The article on Bentham's Codification Papers, in the 57th Number of the Edinburgh Review (Nov. 1817) is from his pen. The circumstances under which it was written are stated in the Diary:

"I amused myself, after my return to Tanhurst, with writing a paper on this work, which I have since given to Brougham, to insert in the Edinburgh Review, and it has accordingly appeared in the number which has just been published, and which is the review for November last. My principal object in writing it was to draw the attention of the public to those evils which appear to me to be inseparable from an unwritten law, such as is the Common Law of England."

He has done this in a manner that reflects small credit on his candour or capacity. His argument consists of an amplification of the fallacy that judges make the law under the pretence of declaring it. He contends that this is a bad mode of legislation: 1, because the laws thus made are *ex post facto*; 2, that all considerations of fitness or expediency are necessarily excluded; 3, that the duty of legislation must often be cast on those who are ill qualified to legislate on the particular subject which accident may allot to them; 4, that the people have no control over those by whom the laws are made.

As his name has gained many proselytes, we must pause a moment to expose the errors of his reasoning; and luckily

¹ Vol. iii. p. 209.

such sophistry may be exposed without going far into the general question.

In illustration of his second ground of objection, he refers to some of the absurdities connected with the old law of appeal in criminal cases, and after urging that the judge would be bound to enforce them notwithstanding their incompatibility with modern manners, he remarks:

“Not only is the judge, who at the very moment when he is making law is bound to profess that it is his province only to declare it; not only is he thus confined to technical doctrines and to artificial reasoning,—he is further compelled to take the narrowest view possible of every subject on which he legislates. The law he makes is necessarily restricted to the particular case which gives occasion for its promulgation.”

Now how can a man be said to legislate, in any fair acceptation of the term, who is tied hand and foot in this manner? what is the process described in the above extract, but the very process which every person filling a judicial situation, either with a code or without one, must go through? or would it have helped the matter if, instead of finding the law of appeal firmly bedded in the reports and text books, the judges had found it embalmed in the statute book?

We know that our own written is more uncertain than our unwritten law: that the acting working law of France is not to be collected from the Code, but from two or three hundred volumes of decisions and treatises; and that the wisest legislators have never yet succeeded in anticipating the wants of posterity or excluding judicial discretion. If Edward the First, the English Justinian, had framed a complete civil code, he would undoubtedly have inserted the most minute provisions regarding real property, but he would have been silent as to bills of exchange and charter-parties; it would have been left to the judges to supply the deficiency, by extending the common-law doctrine of contracts to these new fangled instruments as they sprung up; and Lord Mansfield would be still obnoxious to the charge of having formed the best part of our commercial system without the assistance of the legislature.

Edward the First would also most probably have confirmed appeals and wager of battle; and as there is no more reason (indeed rather less) why the legislature should interfere with

a code than with the common law, the judges of more enlightened times would have been under the same sorrowful necessity of sanctioning them. Instead of proving that the judges legislate, Sir Samuel Romilly's illustration proves that they do not. In fact, he either did not understand, or did not choose to state, the real question, which relates exclusively to form. If any given provision of the law be bad, alter it: establish a standing board of revision, if you like; but do not supersede the common law by a code, until it can be made plain that *the same* rules and doctrines will work better in the shape of a long act of parliament than in a good text-book or digest.

The fourth objection stands thus:—

“It is supposed to be a maxim of our constitution, that we are to be governed by no laws but those to which the people have by their representatives given their consent. No man, however, will assert, that the consent of the people was ever obtained to the common law, which forms so large a portion of our jurisprudence. Our legislators here have been, not the representatives of our choice, but the servile instruments of our monarchs—at one time, the great delinquents who presided in our tribunals in the days of Richard the 2d,—and at another, the corrupt judges of the Jameses and the Charleses, who suffered themselves to be practised upon by the king's law officers, and met in secret cabals to decide the fate of the victims of the crown, before any accusation was openly preferred against them;—the men who, by their abject obedience to the dictates of their master, when they were his hired advocates, and by the keenness with which, as his blood-hounds, they hunted down the prey he had marked out, had sufficiently proved how well disposed they were to do him good service in the high and sacred office of a judge.”

We have already shown that the judges have never exercised such a power; but if they had, Jeffreys and Scroggs were surely just as trustworthy as the ignorant parliaments of the Plantagenets, the servile parliaments of the Tudors and first Stuarts, or the bloody parliament which not only sanctioned but compelled the worst series of judicial prosecutions on record, those connected with the Popish plot. Moreover, the writer knew full well that the law was clear enough when these victims were hunted down: that the blood-hounds of despotism would have over-leaped the provisions of a code

as easily as they over-leaped the provisions of the common law; and that some of the best judges on matters of civil right have been men whose political purity was more than suspected by their contemporaries.

He speaks of Bentham in this paper in a manner which may pass either for a eulogium or a quiz, and pays a warm tribute to Dumont, who rose ten per cent. at Geneva in consequence. Bentham's vanity was far too voracious to be satisfied; and he afterwards paid off his critic by circulating a hand-bill to the effect that he, Jeremy Bentham, being of sound mind and body, was of opinion that Sir Samuel Romilly, a Whig and moderate Reformer, was not a fit person to represent Westminster.

Amongst his papers were found a variety of essays, more or less complete, on topics connected with the reform of the criminal law, and in his will he begs Mr. Whishaw (his executor) or Lord Brougham, to look them over and publish such parts as they may deem useful: "that such a publication may be injurious to my reputation as an author or a lawyer, I am quite indifferent about." All these, for reasons stated in the preface, are suppressed; but some characteristic observations on his prospects at different periods, and on what he intended to do should he ever become Chancellor, are printed at the conclusion of the third volume, under the title of Letters to C.

Altogether, the impression left by a perusal of his writings, including the Diary, is by no means favourable to his fame. That certainly was no common man, who could head one great section of the bar of England for nearly twenty years, rank as one of the leaders of his party, and take a prominent share in all public questions of moment during the best portion of the time; who could persevere in a good cause, through ridicule, misrepresentation and defeat, till the principle was firmly established and the final consummation within view; who was regarded as an oracle by his associates, whilst his opinions were eagerly sought after by all, from the prince to the peasant, who had occasion to act in any trying or delicate emergency; and who was successively invited to represent the two most important constituencies in the kingdom (Bristol and Westminster) without advance or solicitation on his part. Still we cannot agree with Lord Brougham, that "his capacity

was of the highest order," or "that he possessed an extraordinary reach of thought."

Sir Samuel Romilly was emphatically a good man, but not quite a great one; he possessed a sound and practical, but not a comprehensive understanding; he invariably meant well, and never aimed at more than he knew himself capable of performing, but his range was limited, and, from the poverty of his imagination, he often failed to see the full bearing of subjects or the remote consequences of events. His integrity was spotless; he was animated by the most ardent zeal to benefit mankind; and the quivering lip and flushed cheek with which he listened to a tale of oppression, gave strong token that there was nothing false, factitious or speculative in his philanthropy. But he was also, what Dr. Johnson termed Bathurst, "a good hater," and this must have added considerably to his influence with his party, for nothing pleases a party more than to find their prejudices partaken by a man esteemed for his stern moral rectitude. They who felt rebuked by the severe impartiality of Mackintosh, and cited Lord Brougham's Sketches of Tory statesmen as proofs of tergiversation, might well cherish and make much of an associate of superior weight, who could see nothing to admire in Canning. However, it is needless to speculate on the secondary causes of his authority; for a moderate degree of discretion and disinterestedness, a deep devotion to some one high object, an apt command of the common places of public virtue, a short tenure of office, reserved manners, and a due discharge of the domestic duties—these are quite sufficient, as political morality goes, to erect a much inferior man into a Brutus or Phocion at any time.

He disliked his profession from the first, and considering the repugnance with which he pursued the study, the legal knowledge he amassed *invitâ Minervâ* adds not a little to our admiration of his powers. He was not esteemed a very profound lawyer, but this in his position means nothing more than that his legal knowledge did not stand out in strong contrast to his other qualities,—that he was *undique teres atque rotundus* as an advocate; for a man who could lead the equity bar during so long a period without any obvious deficiency in this respect, must have had law enough to make the fortune of an ordinary

practitioner, if not enough to compete with a Hargrave, a Bell, or a Sugden. Still it is a remarkable circumstance that not a single allusion to any individual law book is to be found in the narrative, the letters, or the diary; though he must have read several which might fairly claim a place in Mr. Hallam's *Literary History* or any other work which professes to trace the intellectual progress of mankind. Neither Coke's fullness, nor Fearn's subtlety, nor Blackstone's elegance and clearness of outline, elicit a remark!

Whilst the courts were sitting, he was occupied ten hours a day upon the average in the House of Lords, before the Chancellor, or in the Rolls. He had also to attend parliament; but Lord Brougham says that he found time to read every new publication of interest, whether French or English, and so far as books on politics or legislation are concerned, the diary bears testimony to the fact. This again is no slight praise in one whose political education was, in the common meaning of the term, completed at an epoch when Fox and Lord Ellenborough were boasting that they found it impossible to read Adam Smith; a boast which brings down Fox—wherever it may place the chief justice—to the level of an accomplished intellectual gladiator.

Romilly is said to have been fond of works of fiction as a relaxation, and in one of his early letters we find him recommending Charlotte's Smith's novels to a friend. The reflections were sufficiently obvious—but it is worthy of remark that his reflections on Sheridan's funeral are a literal prose version of part of Moore's monody:

“How proud they can flock to the funeral array
Of one whom they shunned in his sickness and sorrow,
How bailiffs may seize his last blanket to day,
Whose pall shall be held up by nobles to-morrow.”

In all the relations of private life Romilly was unexceptionable: nothing can be more beautiful than the mingled feeling of fondness and veneration with which his family regarded him; and the select circle of friends who were admitted to his intimacy, still speak of his Saturday parties as always made pleasing by his polished ease of manner and sometimes gladdened by his playfulness. He never saw company on Sundays,

and Lady Romilly told a friend that every week-day except Saturdays he had papers to read on his dinner-table, which he left at eight at farthest for his chambers, the House of Commons, or the Rolls Court. He always returned, if practicable, to a light supper with her, and she seldom went out for fear of missing him.

Besides betraying occasional symptoms of his constitutional irritability, he was somewhat reserved and formal in his intercourse with the bar, but they still cherish his memory, and dwell with pride upon his name, as one of those which have most contributed to elevate the character of the profession with the world at large.

He died Nov. 1st, 1818. It can serve no useful purpose to dwell on the concluding scene. The death of Lady Romilly (Oct. 28, 1818,) was too much for his sensitive affectionate disposition, and he destroyed himself.

H.

ART. IV.—ON THE RESPONSIBILITIES OF JUDGES OF INFERIOR COURTS.

A CASE has recently occurred before the Judicial Committee of the Privy Council upon this subject, which it peculiarly behoves the several judges of Vice-Admiralty Courts to be apprized of, and which will not be uninteresting to the public in these days of attachment for alleged contempt. We allude to the case of an appeal from the Vice-Admiralty Court of Gibraltar to the Judicial Committee of the Privy Council, which, as our readers are aware, is now by act of parliament substituted as the appellate tribunal from such courts, instead of the High Court of Admiralty, and which succeeds therefore to all the powers and duties of that learned and famous court, and no more.¹

It is not necessary to enter into the nature or merits of the cause. The judgment of the Vice-Admiralty Court in question has subsequently been reversed (Lushington, judge of the Admiralty, *diss.*) though without costs; but the question to which we desire to call the reader's attention is consequent

¹ See the case of *Chesterton v. Farlar*, 7 Adolph. & El. 713.

upon the following interlocutory order of attachment against the judge, registrar and marshal of that Court :

“Extracted from the Registry of Her Majesty’s High Court of Admiralty and Appeals.

“On Saturday the Seventh day of December, in the year of our Lord 1839, before the Judicial Committee of Her Majesty’s Most Honorable Privy Council, at the Council Chamber, Whitehall.

“Present LORD BROUGHAM,
SIR JOHN BERNARD BOSANQUET, KNT.
THE HON. THOMAS ERSKINE,
SIR HERBERT JENNER, KNT.
DR. STEPHEN LUSHINGTON.

In the presence of

H. B. Swabey,
D^y Registrar.

| | | |
|---|---|--|
| <p><i>Barton and others</i> <i>against</i> <i>Our Sovereign Lady the Queen</i> <i>and</i> <i>Shirreff and others.</i> Ship Winwick. <i>Wm. Hodge, Mr.</i> <i>Gostling. Nicholl.</i></p> | } | <p>The Certificate of the monition to transmit the balance of the net proceeds of the ship and cargo is continued.</p> |
|---|---|--|

“In pain of the Worshipful Barron Field, Esquire, the Judge ; James Ross Oxberry, Esquire, the Registrar ; and Edward Prichard, the Deputy Marshal of the Vice-Admiralty Court of Gibraltar, not having complied with the tenor of the monition personally served on them respectively, to transmit the sum of nine hundred and fifty-five pounds, ten shillings and tenpence (£955 : 10s. 10d.) into the Registry of this Court, the said sum being the balance of the net proceeds of the said ship or vessel Winwick, her tackle, apparel or furniture, and the goods, wares and merchandizes laden therein, as mentioned in the said monition : their Lordships, at the petition of Gostling, on motion of counsel, decreed them to be attached for such their contumacy and contempt ; but direct the attachment not to issue for two months from this day.

(Signed)

“ARDEN,
“Registrar.”

The history of this alleged contempt is as follows. On the 20th July, 1838, the judge of the Vice-Admiralty Court of Gibraltar pronounced the ship Winwick to have been, at the time of her seizure, employed in the illegal transporting,

removing, carrying away, or conveying of slaves or persons as or in order to their being dealt with as slaves, under the Slave Trade Consolidation-Act, and condemned the same accordingly as forfeit to the crown, and also condemned the master, first mate, and owners in costs of suit. On the 3rd August following the claimants asserted an appeal from this decree, and entered into a bail bond with sureties in the sum of £100 to prosecute the appeal and answer the costs thereof, as they were required to do by the rules and regulations made in pursuance of an act of parliament of 2 Wil. IV. c. 51, and established by order in council of 23d June, 1832; but appellants (and this it is important to observe) are not required to give any security for the performance of the judgment of the Vice-Admiralty Court, or for the payment of the costs in that Court. On the 9th January, 1839, the judge and registrar of the court received the usual inhibition from the appeal court, inhibiting them from doing or attempting any thing to the prejudice of the parties appellant as long as the cause should remain undecided. On the 8th February following, the appellants, not being able to procure sufficient bail for the ship (which was in the hands of the marshal of the Vice-Admiralty Court) to be surrendered to them, the counsel for the seizors moved the Court for the sale of it, upon a ship builder's affidavit of perishability; this was accordingly decreed by the Court, and the ship was sold by auction at Gibraltar on the 14th March, for the sum of 7050 dollars, being 550 more than her appraised value.

The counsel for the seizors then moved the court that their costs, including the judge's, registrar's and marshal's fees and expenses, should be paid out of the proceeds of such sale; and no monition having at that time been issued to transmit any proceeds into the registry of the High Court of Admiralty, and the judge,—considering that, in Courts of Admiralty, the proceedings are *in rem*, that the *res* when condemned is liable to pay the costs of the suit in the first instance, that the appellants were not within the jurisdiction of the Vice-Admiralty Court, and were not required by the rules and regulations, before referred to, to give any security for the payment of the costs of that court,—believing also the practice of the High Court of Admiralty, and knowing that of the Vice-Admiralty Court of

Gibraltar,¹ to be to allow of such deductions from the produce thereof, where the thing in question has been condemned to the seizors with costs,—granted the motion as of course, and the costs and fees and expenses were taxed and paid by the registrar out of the net produce of the ship, that is to say, the costs on the part of the crown and the seizors at 2146 dollars, the judge's fees at 100 dollars, the registrar's fees (including poundage upon paying the money out of court) at 499 dollars, and the marshal's fees (including 1126 dollars, money out of pocket, paid to ship keepers, &c.) at 1748 dollars.

It was not until the 19th April following that the first monition, dated at London the 3d April, to transmit any proceeds, was served upon the judge, registrar and marshal at Gibraltar, that is to say, a month after the costs had been paid. In obedience to this monition, the registrar, on the 22d May following, transmitted into the registry of the High Court of Admiralty the balance of £607 : 3s. 8d. But on the 3rd July following, the judge, registrar and marshal were served with another monition, monishing them or one of them to transmit the sum of £955. 10s. 10d., being the sum deducted and retained as the amount of costs incurred on behalf of Her Majesty, and the fees of the judge, registrar and marshal, in proceeding to condemnation of the ship. To the last mentioned monition, they all three made a special return in writing of the foregoing facts, and concluded such return by stating, that, if the judge had committed any error in the case, such error proceeded solely from a mistake of the practice of Courts of Admiralty, not from any intention of disobeying the inhibition of the superior court, and that the registrar and marshal merely acted in obedience to the orders of the Vice-Admiralty Court. They all submitted that none of them could be answerable in their persons or property for a judicial error, and they therefore prayed that the Judicial Committee would, under all the circumstances of the case, at least reserve this question till after the hearing of

¹ The same practice was pursued in this Court in 1836, in the case of the Spanish brig *Cazador* and cargo, which were condemned under the same act of parliament, having been seized by the then Governor of Gibraltar, Sir William Houstoun, who was paid his costs out of the proceeds of the cargo, pending an appeal to the same tribunal, excepting that in that case there happened to be no monition to transmit proceeds, either after such payment or before, but there was the usual inhibition, and such monition might at any time afterwards have issued.

the appeal upon its merits. *Dis aliter visum est*; and the order was made, with a copy of which we opened this article. This order was complied with by payment of the money by the Lords Commissioners of Her Majesty's Treasury, who had taken up the seizors' cause; and the judge of the Vice-Admiralty Court of Gibraltar did not happen in this case to be compelled either to pay the money out of his own pocket or to be imprisoned in his own gaol. But the case being now at an end, it appears to us that the precedent of this decision on the part of the Judicial Committee is well worth examining, and we take the liberty of examining it with the most unfeigned respect for many of the members of that multifarious tribunal.

In the first place, it must be conceded that a judge of an inferior court is liable to be attached for contempt of an inhibition to proceed, after appeal to the superior tribunal. It is laid down in Clarke's *Praxis in Curiis Ecclesiasticis*, to which his Admiralty Practice refers us on this head: "*Judex ad quem non solum debet attemptata, prius et ante omnia, revocare, sed etiam judicem attemptantem, et partem appellatam, si ea petente facta fuerint, arbitrio suo corrigere, et condemnare utrosque in expensis.*"¹ Accordingly we find, from the life of Sir Leoline Jenkins, that a rule to shew cause was granted by the Court of King's Bench why an attachment should not go against him as judge of the Chancellor's Court of the University of Oxford, for an insufficient return, on a question of the jurisdiction of the inferior court.² In the case before us, no rule was granted to shew cause, but the judge was at once ordered to be attached for non-compliance with a monition.

The right of the superior court to attach the judge of an inferior for contempt of an inhibition may be also inferred from two cases, which will be found reported in Dallas's United States Reports, vol. ii. p. 87; and it cannot be denied that, if the superior court has the power to inhibit the inferior from further proceeding, it must have the power to compel an obedience to such inhibition by some means. But it will be observed that, in the case before us, the alleged contempt is not for disobedience to the inhibition to proceed; that disobedience was *ex necessitate*, and seems to be condoned by the

¹ Titul. 265.

² 2 Life of Sir L. Jenk. 654.

Appeal Court; but for noncompliance with a monition to transmit the proceeds of that disobedience, which inability arose from an erroneous judgment of the Court of Vice-Admiralty, pronounced a month before the receipt of that monition. Whatever a judge of Vice-Admiralty may be, in the case of an inhibition he is not, *quoad* this monition, a *ministerial* officer of the Appeal Court; still less is he the registrar to transmit proceeds. In the case of the King v. the Bishop of St. Asaph,¹ on motion for an attachment against the bishop for not returning a *feri facias de bonis ecclesiasticis*, the Court of King's Bench said, that the chancellor, commissary or official were the proper persons to return these writs; and in the King v. Loggen attachment was accordingly issued to such chancellor. The judge in the case before us is not the proper person to receive and transmit proceeds: and he cannot be converted into a registrar, because he has made an erroneous order for payment of those proceeds. It is against common law and natural justice that a judge should be personally answerable for an honest error in judgment.

In the case of Chesterton v. Farlar, before cited, Lord Denman, C. J. said: "If the Judicial Committee, sitting as an ecclesiastical court, do any thing against common law, we may then interfere."² In this admiralty case, therefore, the Court of Queen's Bench would probably have prohibited the committee from proceeding with this attachment. The civil law allowed of torture, of challenging judges, of making judges parties if they pronounced injurious decrees without good grounds, *atque alia enormia*. Would the Court of Queen's Bench permit these things now?

It has been lately solemnly decided in the House of Lords, that attachments for contempt lie against officers of the court, parties to the suit, and intermeddling or even assistance—refusing strangers;³ but it has nowhere been held that they may be issued against judicial officers for errors in judgment. It is one of the first principles of the law of England that a judge is not answerable in his person or property for an honest

¹ 1 Wilson, 332.

² Prohibitions are the constant remedy of the common law, to prevent the encroachments of the civil law. 2 Chalmers's Opinions, 208. See also Boraing's case, 16 Ves. 346, and 3 Campbell, 388.

³ Miller v. Knox, 4 Bing. New Cas. 574.

error. If it were otherwise, nobody would be, or could afford to be, a judge. If a judge were to adjudicate with the fear of compensation or imprisonment before his eyes, how could he calmly and disinterestedly exercise his judgment? He would always be tempted to err on what is called the safe side; or he would, like a sheriff, take a bond of indemnity from the party in whose favour he decided, as the American Vice-Admiralty judge did, in the case before cited from Dallas. That is a very singular case, but far too long for us to relate. It is, however, well worth reading.

There was another, as well as a better course, in our humble opinion, for the Judicial Committee to have taken in this case. Neither the appellants nor the respondent were within the jurisdiction of the Vice-Admiralty Court of Gibraltar; but they were both within that of the Appeal Court. Clarke says, in the passage before quoted, that the Appeal Court may, for attempting to proceed after inhibition, punish not only the inferior judge, but the respondent, if the act was done upon his petition. This was clearly the case in the present instance of payment of costs; the respondent moved for such payment, and the course of the Judicial Committee therefore seemed obvious as well as just, to require the refunding from the respondent, who was primarily liable to his proctor and the officers of the court, and not from the judge, or even from the registrar and marshal. But this course was not pursued by the right honourable committee, even against the respondent *in conjunction with the judge*, as Clarke lays down the practice to warrant; but the judge and the other officers of the court were alone attached and condemned in costs, and that not for wilful disobedience to a previous inhibition, but for involuntary inability to comply with a subsequent monition.

The analogy between this case and the proceedings in privilege, lately before the House of Commons, fails, inasmuch as the House did not dare to attach the judges of the Court of Queen's Bench, as it pretended it had the power to do, as it ought in manliness to have done, and as the House of Commons did in the year 1689. To complete the analogy, the House should have joined those judges in the attachment against the sheriffs for not repaying the execution money to the publishers of the libel, and have ordered the judges to be committed with the sheriffs in default of such repayment.

ART. V.—PRACTICAL POINTS.

I. *As to Estates created under Powers.*

It is said by Sir Edward Sugden, in vol. ii. of his work on Powers, p. 25, "The estates created by the execution of a power, take effect precisely in the same manner (with the exceptions that will shortly be noticed) as if created by the deed which raised the power." And the exception given is, that the estates created under a power do not take effect from the date of the deed creating the power: but there are other exceptions. Suppose the limitation is unto and to the use of A., nevertheless to such uses as A. shall by any deed appoint, and A. afterwards appoint to B., B. takes the legal estate; but put him into the deed creating the power, and he would only have an equitable estate. Here we may remark, that the rule, there cannot be a use upon a use, has a better reason to rest upon than is generally alleged. If a limitation be to A. to the use of A., to the use of B., we have a positive declaration that A. shall retain the beneficial enjoyment, and an equally positive one that B. shall have it. But if the different parts of a deed cannot be reconciled, the first part shall prevail, and therefore B. is not entitled to the benefit of the statute, which only operates where it is clear that one person has the seisin not for the benefit of himself but for another. The Courts have adopted the rule in question in the construction of wills also, though there our reason would not apply, on the ground, it is assumed, that, even in wills, technical expressions must be understood in their proper sense, unless the contrary appear to have been the intention of the testator; and the limitation just given is considered as the proper technical phrase for giving the legal estate to A. in trust for B. Again, we may say, it is impossible in a court of law that two different persons should have the beneficial interest in the same tenement at the same time, just as a fee cannot be mounted upon a fee. This explains a difficulty which has been started, and not very satisfactorily met, by learned writers: It is correctly said, if a limitation be to A., to the use of A., to the use of B., B. has only an equitable estate: but if the limitation be to A. to the use of A., never-

theless to such uses as A. shall by any deed appoint, and A. appoints to B., B. takes the legal estate. We have seen why B. has not the legal estate in the first case, and we can see why he should have it in the second example. In that example there is a positive declaration that A. shall have the use, and an equally positive one that such person as A. shall name shall have it. Are these declarations irreconcilably inconsistent? Certainly not. A. retains the use until he appoints, and then it vests in the person he names; and it is not inconsistent to say that he retains the use and yet that he may appoint it to whomsoever he will. There is in fact a positive declaration that he shall only retain the use until he appoints—"Nevertheless to the use." See a masterly article on this subject in Hayes' *Introduction to Conveyancing*, 4th edit. p. 356. Suppose a limitation to A. and his heirs, to the use of A. and his heirs, to such uses as B. shall appoint, and B. appoints to C. in fee. Has C. the legal estate? He has. *Semble*.

It may be useful here to remark, that it is old law that the destination of a use may be determined by what appears to be the intention of the parties; for if one make a feoffment in fee to the use of himself for years, without limiting any other estate, the use shall not result to him in fee, because that would merge the term against the express declaration and manifest intent of the parties, and therefore in such case the reversion in fee must continue and settle in the feoffee.¹

II. *On Estates vesting in Trustees.*

John Atkinson, by his will dated 3rd September, 1798, devised and bequeathed all his real and personal estate to three trustees, upon trust to allow his wife Jane Atkinson to use his household furniture during her life, and after her decease to sell the same and to apply the money as part of his residuary personal estate; and upon trust, out of the rents of his real estate, to pay to his wife an annuity of 100*l.* a year, and also to pay certain other annuities; and upon trust to apply the residue of the rents, together with the residue of his personal estate, in payment of his debts, with a direction for them to

¹ Lev. 111; Bac. Abr. Leases, 452.

invest any monies which might remain after payment of his debts, for the benefit of the parties who might become entitled to his residuary estate; and upon trust, after the decease of his wife, to sell and convert into money all his real and personal estate, and to divide the proceeds among certain persons named.

The testator died in the year 1799, leaving all the parties in his will named him surviving. The trustees all refused to prove the will, and they executed a deed of renunciation required by the Ecclesiastical Court before letters of administration, during the minority of the residuary legatee, could be granted to the widow with the will annexed: but this deed referred only to the personal estate of the testator, and had no reference to the real estate. As to the real estate the trustees never interfered at all; and the heir at law of the testator, who was one of the cestuis que trust and residuary legatee named in the will, when he came of age, which was in the year 1805, entered into possession of the real estate, and received all the rents, he paying the annuity of the widow, and also the other, or part of the other, annuities. Previously to the heir entering into possession, the rents were received by the widow, the trustees never having given any assent whatever to the will.

The widow died in the year 1835, having survived all the trustees by several years. Upon the death of the widow, the heir at law of the surviving trustee was requested by the cestuis que trust to sell the real estate, and take upon himself the remaining trusts of the will.

Besides the inexpediency of the trustee undertaking so great a responsibility, the question arose whether any estate was, in fact, vested in him.

The determination of this question depended upon two others; first, whether the conduct of the trustees did not amount to a disclaimer of the devise, so as to prevent any estate vesting in them thereby: secondly, assuming that there was no sufficient disclaimer, whether the estate of the trustees was not defeated and extinguished by the operation of the statute for the limitation of actions.

As to the first point, it is clear that in the case of a devise by will, the freehold or interest in law is in the devisee before

and without any act done by him.¹ But it is also equally clear, that the estate devised may be refused or disclaimed, and then its effect wholly ceases; thus it is said in Perkins,² "that in case of a devise a man may refuse the possession, and not meddle with the same, and so may disagree; for a man shall not be compelled to take by a devise, whether he will or no:" and in Shepherd's Touchstone³ it is said, "It seems a verbal waiver is sufficient in this case;" and these authorities are in accordance with the case of Bonefant v. Greenfield,⁴ where it seems to have been distinctly admitted, that a verbal disclaimer was sufficient; and it has been decided in two modern cases,⁵ that a disclaimer by deed is clearly enough; and in the former case, Mr. Justice Holroyd expressed a strong opinion that a party was not bound to disclaim by deed. In Butler and Baker's case,⁶ it was held that a mere parol waiver would not divest an estate unless accompanied or followed by some act. In a modern case, where there was a devise to a party for life, the party refused to accept any benefit under the will, but claimed the land under another title; but discovering that the title relied upon was insufficient, it was held that the party, notwithstanding her verbal refusal to take any benefit under the will, was entitled to the estate thereby devised; the Court observing, "In this case the disclaimer is not of any estate in the land, but only of benefit under the will, accompanied in every instance with an assertion of a right to the land by a higher and better title."⁷ In Stacy v. Elph,⁸ a person named as trustee in a will, renounced the executorship, but not the real estate or the trusts, but he never acted in the trusts, and he purchased part of the real estate from the widow and heir at law; and it was held that the fact of such purchase was a sufficient disclaimer. "It is true he never executed a deed disclaiming the trust, but his conduct disclaimed the trust; in the purchase of the small real estate made by him, he took by feoffment from the widow and eldest son of the testator, in whom the es-

¹ Co. Litt. 111 a.² P. 569.³ P. 452.⁴ Cro. Eliz. 80.⁵ Townson v. Tickell, 3 Barn. & Ald. 31; Bagbie v. Crook, 2 New Cases, 70. See too, Nicolson v. Wordsworth, 2 Swanst. 365.⁶ 3 Rep. 25.⁷ Doe d. Smyth, 6 B. & C. 112.⁸ 1 Myl. & K. 195.

tate could only vest by the disclaimer of the trustees." Per Leach, M. R. These are all the authorities to which it seems material to advert. And the result appears to be, that, whether under a deed or will, an estate passes and vests, unless the grantee or devisee, by matter of record, by deed, or by some other act, disagrees and disclaims. In the present case it certainly cannot be shown that there was any express refusal to accept the devise of the real estate; but the question is, whether the fact that the trustees did not during their whole lives take any step to recover the possession of the land, though perfectly aware of the will, and that the trusts required their active interference from the death of the testator, did not amount to an express disclaimer of the devise; the law doth ever respect an act without words, more than words without an act. Here the trustees allowing other parties to receive rents and to apply the same as they thought proper,—for which they, the trustees, would be answerable if it were found that they assented to the devise made to them,—was surely an act to which great weight may be attributed. It might be urged, that the trustees never having interfered in the management of the property, as the will required them to do, it must, after the lapse of nearly forty years, be presumed (certainly if required for the protection of the assets of the trustees) that they did execute a formal disclaimer by deed. In the present case it could not, we think, be reasonably presumed that the widow, and afterwards the heir, received the rents and applied them as they thought fit, with the authority and assent of the trustees; for the law never presumes that trustees have committed a breach of trust.

This brings us to the second point, which is, whether the statute for the limitation of actions has not annihilated the estate of the trustees; and it is clear, that if the widow and the heir at law did not receive the rents under the authority, express or implied, of the trustees, the trustees never had even a constructive possession of the property, and the period allowed by the statute referred to for the trustees or the heir at law of the survivor to claim the land, is long since expired, and consequently the right and title of the trustees are extinguished.

It will be observed, that our argument in the foregoing ob-

servations is principally founded upon the fact that the devise by the will imposed active duties upon the trustees from the moment of the testator's death. The case might have been different had the will not required the trustees to interfere till the death of the widow.

III. Power to appoint New Trustees.

When new trustees are appointed under settlements of real estates, questions sometimes arise how the estates vested in the former trustees may be best vested in such new trustees jointly with the continuing trustee or solely, as occasion may require. When the retiring trustees are releasees to uses in the original settlement and trustees to preserve the contingent remainders, some practitioners seem to think that a seisin to serve the uses should also be vested in the newly appointed trustees, but that opinion, we believe, is not generally followed. Perhaps the best and neatest plan is to give the party, who has power to appoint new trustees, a power to revoke the uses of the settlement, and to relimit the same, so that the newly appointed trustees may be completely put into the place of the deceased or retiring trustees. If this mode be adopted the power to appoint new trustees may be to the following effect:—"Provided always, and it is hereby agreed and declared, that if the trustees hereinbefore named or any of them, or any future trustees or trustee to be appointed in the stead of them or any of them as hereinafter is mentioned, shall happen to die, or be desirous to be discharged from, or refuse, decline or become incapable to act in the trusts hereby in them reposed, before the same shall be fully executed or be discharged, then and in every such case it shall and may be lawful to and for the said [father and son] during their lives, and after the decease of either of them then for the survivor of them, and after the decease of such survivor then for the trustees or trustee for the time being of the trust premises, the trustees or trustee whereof shall so die, desire to be discharged, refuse or become incapable to act as aforesaid, by any writing or writings under their or his hands and seals or hand and seal from time to time, to substitute and appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or re-

fusing, declining or becoming incapable to act as aforesaid. And that when and so often as any new trustee or trustees shall be appointed as aforesaid, all the trust estates, monies and premises, the trustee or trustees of which shall so die, desire to be discharged, or refuse, decline or become incapable to act as aforesaid, shall be thereupon with all convenient speed vested in the surviving or continuing trustee or trustees of the same trust estates, monies and premises, and in such new or other trustee or trustees jointly, or if there shall be no surviving or continuing trustees or trustee of the same trust estates, monies and premises, then in such newly appointed trustees only, upon and for the same trusts, intents and purposes as are hereinbefore limited, expressed and declared of and concerning the same trust estates, monies and premises respectively, the trustee or trustees whereof shall so die, desire to be discharged, or refuse, decline or become incapable to act as aforesaid, or such of them as shall be then subsisting, undetermined, and capable of taking effect. And in order that such trust estates may be conveniently and effectually vested in such new trustee or trustees jointly with the surviving or continuing trustee or trustees, or in such new trustees only as occasion shall require, it shall be lawful for the person or persons substituting or appointing such new trustee or trustees under or by virtue of the power hereinbefore for that purpose contained, by any deed or deeds to revoke all and every the uses, trusts, limitations, powers, provisoes and agreements in and by these presents limited, created, declared and expressed of and concerning the hereditaments hereinbefore appointed and released or expressed and intended so to be, or any of them or any part thereof, and by the same or any other deed or deeds to appoint the hereditaments, the uses of which shall be so revoked as aforesaid, to such or the like uses, and upon and for such or the like trusts, intents and purposes, and with, under and subject to such or the like powers, provisoes and agreements as are hereinbefore limited, expressed and declared of and concerning the same hereditaments, or such of them as shall be then subsisting, undetermined, and capable of taking effect," with a declaration subjoined "that so only nevertheless these presents shall thenceforth be read and construed as if the name or names of the newly appointed trustee or trustees had

been inserted herein, instead of the name or names of the trustee or trustees to whom he or they shall be so appointed to succeed as aforesaid ; and it is hereby expressly declared that every such new trustee or trustees shall and may in all things and in all respects act and assist in the management, carrying on and execution of the trusts and powers to which he or they shall be so appointed, as fully and effectually to all intents and purposes as if he or they had been originally in and by these presents nominated a trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed trustee or trustees, and as the trustee or trustees in or to whose place such new trustee or trustees shall respectively come or succeed are or is hereby enabled to do, or might or could have done under or by virtue of these presents, if then living or continuing to act in the trusts hereby reposed in them."

We may observe that it is deemed the most correct practice upon the appointment of new trustees to complete the original number of trustees, so that if two of a class of three trustees be dead, two new trustees should be appointed.

IV. Constitution of a Company for erecting a Building, or other such purpose.

When several persons associate themselves together for the purpose of effecting some common object which requires a considerable outlay, and it is agreed that the cost shall be defrayed by the parties in certain proportions,—as according to the number of shares, of a given amount, each shall take,—there is considerable difficulty in so framing the deed of settlement of the company, as to give an easy and convenient remedy for the recovery of the sums agreed to be contributed by the respective shareholders.

There is no doubt such an agreement as we contemplate would constitute a partnership between the parties thereto, in proportion to the amount of their subscriptions; consequently, in order to have a remedy against subscribers making default, there are two difficulties to contend with. First, That one partner cannot sue another; and, secondly, That all the subscribers would have a joint interest in the respective monies to be paid, so that though each should covenant separately, all would have to join in an action against him, in case he made default in payment of his subscription.

In order to avoid these difficulties, the plan we propose is this, that two or more persons, whether subscribers themselves or not, should covenant with the intended company to carry into effect the intended object, upon the subscriptions agreed upon being paid to them, and then each of the shareholders should covenant with such two or more persons to pay his subscription to them. This plan is deduced from the case, *Brown v. Tapscott*, in the Exchequer.¹ There the following agreement was entered into: "Being desirous that the communication between London, Herne Bay, and Margate, should be kept open during the ensuing winter by means of a small steam-boat, we hereby authorize Mr. G. A. B. to charter the Brocklebank, or any other suitable vessel, for that purpose, on the best possible terms; and to make the necessary arrangements for her running on the station during the whole or such part of the winter as may be deemed expedient, on our joint account, each of us taking a proportionate interest in this enterprise, according to the amount subscribed; and the profit or loss to be divided amongst us in proportion to our subscription. In order to form a fund for defraying the necessary expenses, we have each of us paid 10*l.* per cent. on the amount of our subscriptions, and we hereby bind ourselves and agree to pay to Mr. G. A. B. such further instalments, each of us in proportion to his subscription, as it may be necessary to call for from time to time, should the earnings of the boat not be sufficient to pay the expenses. It being, however, understood that our liability is not to extend beyond the amount subscribed by us respectively."

Upon an action being brought by G. A. B., who had subscribed the agreement, and had paid such debts arising from the undertaking as the earnings of the boat were insufficient to satisfy, it was held he could not maintain an action for money paid against another subscriber who had not paid up his subscription, but that the proper form of action was a special assumpsit for non-performance of the undertaking to pay the plaintiff the instalments from time to time. Parke, B., delivered the judgment of the Court:

"This was an action for money paid, with a count on an account stated. It appeared on the trial that the plaintiff, together

¹ 6 Mee. & Wels. 119.

with the defendant and others, entered into a special agreement to this effect. [The learned judge here read the agreement.] The effect of this agreement was to constitute a partnership between those who subscribed, in proportion to their subscription. The plaintiff took an active part in the management of the concern, and the earnings of the boat not proving sufficient, he paid the amount of the debts due to the different creditors, and if nothing else had been done, the plaintiff could not have recovered as for money paid to the partnership use; as one partner cannot sue another in that form of action for contribution to joint partnership liability. But on this agreement the plaintiff might have sued the defendant in a special assumpsit for not performing his undertaking to pay the plaintiff the instalments from time to time in addition to the 10*l.* per cent. to form a fund, as such an action would be founded on the consideration of the plaintiff on his part undertaking to charter and manage the vessel, as much as an action would lie on a covenant in copartnership articles by one partner to pay another a certain sum if the partnership assets should prove deficient. As such an action therefore would lie, the only objection is to the form of the declaration; the count for money paid could not be supported. But it appears, from my Lord Denman's note, that the earnings were admitted to be insufficient to pay the expenses, and that application was made to the defendant to pay the second instalment, and that he promised to pay it. This appears to be sufficient evidence to support the count on an account stated as to that sum founded on the obligation to pay it arising out of the special contract, and therefore the rule to enter a nonsuit must be discharged."

V. As to Title Deeds remaining with Mortgagor.

By indentures of lease and release, dated respectively 24 and 25 January, 1828, several closes of land, situate in the West Riding of the County of York, were conveyed to A. B. in fee. A. B. is now selling part of this property in building sites, and on other part, not likely at present to be required for buildings, he is desirous of raising the sum of 2000*l.* by way of mortgage. But he objects to part with the possession of the title deeds, the production of which is of course often re-

quired on the sale of sites, and he also objects to any memorandum of the proposed mortgage being endorsed on his conveyance of January, 1828. Now the question is, whether in case the proposed mortgage deed be duly registered, the security could be invalidated or in any way prejudiced in consequence of the title deeds being suffered to remain in the possession of the mortgagor without a memorandum of the mortgage being endorsed on the last conveyance?

If the intended mortgagee gets the legal estate, it seems that his security cannot be invalidated by the deeds referred to remaining in the possession of the mortgagor without a memorandum, assuming of course that the intended mortgage deed is duly registered. But should it happen that by reason of some latent outstanding term or otherwise the mortgagee does not get the legal estate vested either in himself or his trustee, he might be prejudiced by the deeds in question remaining with the mortgagor; for the registry is not deemed notice of any equitable incumbrance; and should the mortgagor grant a second mortgage, the granting of which would be facilitated by the possession of the deeds, and the second mortgagee not having notice of the first mortgage, were to get in any legal estate, he would be preferred to the first mortgagee.

Generally speaking, it is not expedient to allow the deeds to remain in the possession of the mortgagor, for besides the risk alluded to above, it enables the mortgagor to sell or mortgage without notice of the first mortgage, and thus may give rise to fraud and questions; but the character of the mortgagor may render it unlikely that he would make an improper use of his power. And further it must be observed, that if the mortgagor did sell or mortgage without notice of the first mortgage, and it could be shown that the first mortgagee had notice of the sale or mortgage, and did not interfere, he might be compelled to confirm the sale or mortgage.

From these observations, and his knowledge of the title and of the parties, the solicitor of the intended mortgagee will be able to advise whether it is prudent to assent to the proposition of the mortgagor. If the mortgagor consents that the deeds should remain with his solicitor till the mortgage is discharged, that would be some security to the mortgagee.

W. C. W.

ART. VI—LORD DENMAN'S ACT FOR TAKING AWAY COSTS IN FRIVOLOUS SUITS.

THE beneficial effects of Lord Denman's Act, 3 & 4 Vict. c. 24, have already been felt, we apprehend, in the discontinuance of many vexatious actions; and we have little doubt that it will prove one of the most useful enactments which have of late years been added to the statute book. Nevertheless, it is probable that some grave question may speedily arise as to the real nature of the duty imposed on the judges by it, and the mode in which its powers are to be exercised.

On the last Western Circuit a case of libel of rather an unusual nature and some local interest was tried. The defendant pleaded not guilty, and justified. The words used were clearly libellous. General evidence was admitted as to the character borne by the plaintiff at the period of the publication. The counsel for the defendant explained to the jury the effect of the act, and made them understand that it was now in their power, with the consent of the judge, to deprive the plaintiff of costs by giving less than 40s. damages. The judge told the jury that the justification, as pleaded, did not quite cover the whole of the libel: and he intimated pretty strongly his opinion that, as to the rest of it, the justification was not made out. The jury (special) immediately found for the plaintiff, damages, one farthing. The judge immediately certified to give the plaintiff his costs.

The jury therefore in this case found that there was morally no libel at all: the judge declared his opinion that the libel was "wilful and malicious;" and it is plain that a similar conflict of decisions must take place in every case of libel, with justification pleaded, where the judge shall certify under this act. It is impossible that a jury can give less than 40s. damages for a libel which in their judgment is wilful and malicious. The blow aimed at the character of the plaintiff may inflict no injury computable in money, because the plaintiff may have no character to lose: or it may inflict an injury for which the highest sum ever awarded by a jury would be an inadequate compensation. But it is wholly impossible to conceive a wound to a man's reputation of which the reasonable salve is a sum under forty shillings. When a jury, therefore,

find for a plaintiff, in libel, with less than 40*s.* damages, they must mean this: that they feel bound to give him a verdict in point of form, but that no injury has been done; either because the plaintiff had no character to lose, or because the statements were true. Either supposition is utterly irreconcilable with the notions of a "wilful and malicious" libel. We have therefore two conflicting decisions by distinct authorities in the same case and the same court, on a question of fact—an immediate appeal from the jury to the judge on the merits.

This is contrary to the principles of English jurisprudence. It may be that the judge in this instance was right, and the jury wrong. It may be, that, in cases of libel on private character, this is generally the case where there is a difference of sentiment between them. We do not contend for the superior fitness of either. Our object is only to point out the inconvenience of this double jurisdiction: this conflict of authorities, which cannot fail in our opinion to exasperate juries against judges, and to encourage those who conduct a case to endeavour to set the one against the other, whenever they happen to perceive an unfavourable disposition in the minds of either—a species of tactics peculiarly calculated to bring justice into contempt.

It is, we know, contended that the act renders it imperative on the judge to certify wherever his conscience is convinced that the grievance is wilful and malicious. If so, our objections apply to the framing of the act itself, and not to the mode in which it was put in execution in this instance. But we confess that our own interpretation of its provisions is different. It does not require the judge to certify, *if he thinks* the grievance wilful and malicious: but merely enacts that the plaintiff shall get his costs if the judge shall so certify. This surely seems to leave the certificate at the discretion of the judge: and to intimate that he may use his power or not as he may think most reasonable, and most expedient, under the circumstances of the case.

Our reader will recollect the analogous words of the 22 & 23 C. 2, c. 9, "wherein the judge shall not certify that an assault and battery are sufficiently proved," and the very different opinion entertained by able judges as to the extent of their discretion under it. But it will be observed that on the

strictest construction of that act, it did not bring the judge and jury into direct conflict. The judge might feel bound to certify that a battery was proved, and by so doing he might give the plaintiff costs of which the jury intended to deprive him; but that was only a legal consequence: the finding of the judge and that of the jury were not in themselves inconsistent.

But it will be asked, why give the judge such a power at all unless it was intended to allow him this opportunity of correcting a bad verdict? In answer it may perhaps be said, that there may be cases of injury to the person or personal property, in which the actual damage may not amount to 40s. and in which the jury, from mistake, from the persuasion of the advocate, or from other conceivable causes, may not give more: and yet the judge may justly certify that the trespass was wilful and malicious. Perhaps we might concede, though we do it with great reluctance—feeling convinced that in such cases the great right is generally attained by the endurance of the little wrong—that there might be cases of a more serious description in which the judge, on maturely weighing the merits, might feel it his duty to use this power, as one to be exercised only in the last resort, to nullify a perverse verdict and right an injured person. But unfortunately the act renders such mature consideration impossible. It requires the judge to certify “immediately afterwards.” The courts have not yet been called upon to decide what latitude they will give to these expressions. But if they mean that the power is to be exercised at the close of the trial, as it has been in the only cases we have hitherto seen, the dangerous nature of the provision is evident at once. In the very moment of annoyance at the perverse view taken by the jury,—in the very height of that temporary irritation which the wisest and most patient must feel at finding the intimation of their opinions utterly disregarded,—smarting, if we may say it without disrespect, under the consciousness of defeat, the judge is called upon by the counsel of the beaten side to protect his client from the consequences of the verdict. Can it be doubted that under these circumstances a judge will often grant a certificate which on a more mature consideration he would have withheld? May he not even feel a pleasure in disappointing the wishes

of the jury, and depriving a defendant of an anticipated triumph, of which in cooler moments he would be ashamed as unworthy of the judicial temper? We say it once more, that we apply these observations in no degree to the particular case which gave occasion to them: they are merely speculations as to the probable results of a literal, perhaps too literal, exercise of the powers now entrusted to the judges, in a class of cases peculiarly calculated to excite a passing spirit of partisanship even in the calmest dispositions.

ART. VII.—THE NEW RECORD SYSTEM.

First Report of the Deputy Keeper of the Public Records, presented to both Houses of Parliament, by Command of Her Majesty.

THE aspect of Record affairs is much brighter, and the task of noticing them much more agreeable, than at the time when we last brought the subject before our readers.* Year after year, almost century after century, struggles had been made to palliate and remedy accumulating defects,—struggles most impotent, and costly wherewithal,—to be estimated in tens and hundreds of thousands of pounds sterling; but not until the year 1838 did the legislature venture on the “hazardous experiment” of striking at the root of the evil, by providing a responsible and sufficient custodyship for the national records.

We have little wish to rescue from merited oblivion past mismanagement: still some allusion to it in the course of the following pages will be unavoidable, in order to form an estimate of what already has been and is likely to be gained by the recent changes. If we were disposed to attribute these to one cause more than another, it would be to the appointment of the present Master of the Rolls. The evils of the old system were felt and acknowledged by other high legal functionaries: Lord Langdale, however, has been the first and only one to superadd action to conviction. In the session

* See Law Magazine, vol. xvii. page 60.

of 1838 an act, of which we give an abstract below,* was passed, which empowered the Master of the Rolls to abolish the ancient and worn out system, and to organize a new one in its stead; and we now propose to acquaint our readers with the progress which has been made in carrying out the new act and in commencing this much needed reform.

In the article to which we have already alluded, we showed that the impediments obstructing the use of the public records, were to be traced to the disarrangement and confusion among the records themselves; to the want of proper facilities of reference by means of calendars, catalogues and indexes; to the imposition of fees, which almost practically precluded the consultation of the records; to inconvenient regulations, to numerous and destructive places of deposit, and to irrespon-

* 1 & 2 Vict. c. 94.—An Act for keeping safely the Public Records. 14 August, 1838.

1. The Public Records (including those in the ancient repositories and those of the several courts) to be under the superintendence of the Master of the Rolls.

2. The Queen in Council may order records in other offices to be included in this act.

3. The Master of the Rolls may issue warrants for the surrender of records above twenty years of age, subject to certain regulations.

4. Powers to make orders for cleaning, repairing, preserving and arranging the records, making calendars, catalogues and indexes; also to remove records.

5. Master of the Rolls may appoint a deputy.

6. Treasury to appoint assistant keepers and other officers.

7. Additional building or buildings to be provided.

8. A Public Record Office to be established—of which Record Offices are to be considered as branches.

9. Master of the Rolls to make rules for the management of the office, and the admission of persons using the records, to fix the fees, and to dispense with fees in certain cases.

10. Fees to be paid into the Exchequer.

11. Seal for certifying copies to be provided.

12. Power to make authentic copies of records, which shall be sealed.

13. Such sealed copies to be received in evidence.

14. Calendars and indexes may be printed.

15. Printed copies of records, &c. may be sold.

16. Power to purchase calendars, catalogues and indexes.

17. Deputy keeper to report proceedings annually to Parliament.

18. Compensation to record-keepers; those entitled to compensation, if "in all respects competent and fit," to be in the first instance appointed as assistant keepers, &c.

19. Certifying as true any false copies of records a felony.

20. Interpretation clause.

sible, negligent and antiquated custodyship. Whilst an instant remedy for many of these evils has been afforded by the Public Records Act, ample means for the correcting of those in which much time must necessarily be consumed, have likewise been provided.

The act was passed in August 1838, but did not touch the record system till July 1840. Before it could be brought into operation, certain preliminary investigations of the salaries and emoluments of the officers of the various record establishments in London, likely to be affected by a change, and of the best scheme for the formation of a new establishment, were required to be prosecuted, and it was not until the period we have mentioned, that these were sufficiently advanced to warrant the commencement of the new system.

The first step taken was to supersede the ancient custody and to create a central office, to which the several record offices were attached as branches. The "Public Record Office" was located at the Rolls House, and Sir Francis Palgrave appointed as the Deputy Keeper of the Records. The offices subjected to the immediate operation of the act, are named in the following Rules and Regulations which have been officially issued by the Master of the Rolls :—

" Rules and Regulations made by the Master of the Rolls for the management of the Public Record Office, for the admission of persons to the use of the records, calendars and indexes, and the amount of fees to be paid for the same, and for copies of records, pursuant to the statute made and passed in the Parliament held 1st and 2nd years of the reign of her present Majesty, intituled, " An Act for keeping safely the Public Records," the same to be observed and paid in the said public office, and in the record offices of the Tower, Rolls Chapel and Chapter House; and the repositories of the records of the King's Bench, at the Rolls House, the Common Pleas in the Carlton Ride, and the repository No. 3, Whitehall Yard, and of the Exchequer of Pleas in the said repository No. 3, Whitehall Yard, and all such other record offices and repositories as shall hereafter be brought under the regulations of the said act, by the said Master of the Rolls :—

" 1. The public office and all the above mentioned offices and repositories are to be opened daily from ten to four, excepting on Sundays and the following holidays :—May 24th, her Majesty's

birth-day; June 28th, her Majesty's coronation; Good Friday and the Saturday following; Easter Monday and Tuesday; Whit Monday and Whit Tuesday; Christmas Day to New Year's Day inclusive, and such days as may be appointed for public fasts and thanksgivings.

" 2. A book is to be kept at each of the said record offices and repositories, in which each party requiring the use of the records is to enter the following particulars:—viz. date—name of party making the application—reference to the record; and the service which he requires, viz. inspection—extract—copy or attendance with a record.

" 3. Upon the inspection of a record, the party may take notes, extracts or copies therefrom, in pencil, as he may think fit.

" 4. Copies are to be made and delivered, according to priority of application, or as near thereto as the nature of the copy will admit of, except in special cases for particular reasons assigned.

" 5. No assistant keeper, clerk or other officer is to act as a record solicitor, or as record agent for individuals, otherwise than in the discharge of his official duties.

" 6. No stranger is to be allowed to have any use of a record, excepting in the presence and under the inspection of an assistant keeper or other officer of the establishment; and in all cases where the record may be liable to be injured or damaged, the assistant keeper is to give such directions for preventing such injury or damage, as the case may require.

" 7. Except the fees under mentioned, no fee nor any gratuity or reward to be received by any officer of the establishment from any person consulting or using the records, save only that if any party should desire to obtain information respecting any records in the Rolls Chapel, from the indexes heretofore belonging to the late Mr. Kipling, the assistant keeper of the records at the Rolls Chapel shall (until further arrangements shall be made for the relief of the public) be at liberty to receive, for the parties who may be entitled thereto, such fees as have been heretofore paid for the use of such indexes."

" TABLE OF FEES

To be paid for the use of the Records, Calendars and Indexes, and for Copies of Records, at the above-mentioned Record Office and Repositories.

£. s. d.

For a GENERAL SEARCH in all the Calendars or Indexes

of each office 0 1 0

£. s. d.

For **INSPECTION** of Records. [The fee to cover all the use which may be made of the record for the current week.]

Each separate roll of chancery or other roll of consecutive enrolments, excepting the specification rolls at the Rolls Chapel..... 0 1 0

The rolls files or bundles of proceedings of courts of common law—each year (the records of the four terms to be covered by the fee)..... 0 1 0

Rolls of ministers and receivers accounts, court rolls, surveys, extents, terriers, deeds and miscellaneous documents classed topographically under one head, whether of parish, town, vill, manor, lordship, borough, city, deanery, archdeaconry or diocese—each set or series..... 0 5 0

Single records of the last-mentioned description 0 1 0

Specifications at the Rolls Chapel—and which is to include the fee for search 0 1 0

Post mortem inquisitions, and other inquisitions upon the file, returns to commissions, pedes, chirographs and concords of fines..... 0 1 0

General inspection of the last-mentioned documents, as to any place or family..... 0 5 0

Rolls of Parliament, or other parliamentary proceedings—each Parliament..... 0 1 0

Proceedings in courts of equity—each suit 0 1 0

Every bound book, port-folio or volume, without reference to the nature or number of the documents, which it may contain 0 1 0

All other documents not before enumerated, each .. 0 1 0

[If the number *bond fide* required for the prosecuting any search relating to any family, place or single object of inquiry shall exceed five, then it shall be in the discretion of the assistant keeper to remit the fees for all above that number.]

For **COPIES** of records. [The fee for the inspection of a record to be deducted if a copy be taken from the record produced.]

Under three folios of 90 words..... 0 1 6

Above three folios—per folio..... 0 0 6

For **EXAMINATION** and Authentication :

Under three folios of 90 words..... 0 1 6

| | £. | s. | d. |
|--|----|----|----|
| Above three folios—per folio, if required..... | 0 | 0 | 6 |
| For ENROLMENT of any specification—per folio..... | 0 | 0 | 6 |
| For annexing DRAWINGS or MAPS to any enrolment or specification | 0 | 1 | 0 |
| For ATTENDANCE at the bar of the House of Lords, or elsewhere, for the purpose of producing records, (including the production thereof), or for giving evidence upon the records—per diem | 2 | 2 | 0 |
| Attending the Master of the Rolls on a vacatur | 0 | 5 | 0 |
| Rolls House, July 1840. (signed) <i>Langdale, M. R.</i> " | | | |

The principal offices in which the old system remains are those which are subject to the superintendence of the Remembrancer of the Exchequer, being the Queen's Remembrancer's Offices, the late Pipe and Lord Treasurer's Offices, and the Augmentation Office. The exemption of these offices from the reform is, we believe, but temporary, and owing in some measure to the suspension of the bill for the better administration of justice, which was so unceremoniously *tabooed* in the House of Commons in the last session: there is little doubt, we understand, of their becoming branches of the Public Record Office in the course of a few months.

Responsible keepers have been appointed to the several branch¹ offices; uniform rules and a uniform scale of fees, which are little more than nominal, have been established in

¹ At the Tower, Mr. Petrie, the late highly respectable keeper, retires on a pension, and Mr. Thomas Duffus Hardy, for many years chief clerk, and very popular with all searchers at the Tower, succeeds him as the new assistant keeper. Mr. Roberts, of the same office, is also appointed an assistant keeper. Mr. Leach, the late keeper at the Rolls Chapel, gives way to Mr. Palmer, who, practically has administered the business of the office almost time out of mind. Mr. Frederick Devon is the assistant keeper at the Chapter House. The records of the Common Pleas and Exchequer of Pleas are placed under the assistant keepership of Mr. Henry Cole. The Rev. Joseph Hunter, employed on the highly important business of arranging the 4000 bushels of miscellaneous records of the Queen's Remembrancer Office, is also an assistant keeper, though at present unattached to an office. The act provides that the new appointments shall in the first instance be given to officers of the record office entitled to compensation who shall be thought "fit;" and some complaints have been made that Mr. Hunter and Mr. Cole, not being legally entitled to compensation, though employed for many years by the Record Commission, should have been appointed. The complaint seems frivolous, unless it can be shown that some "fit" person has been unjustly passed by.

all. A contrast between the old and new system in a single office will sufficiently show how much the public has gained by the change. Let us take the Rolls Chapel; and it must be distinctly understood that we are not holding up the late officers but the system of that establishment to animadversion.

Mr. Hewlett says, the applicants under the old system were not allowed to search themselves. (Ev. 707.) "You told the object of your inquiry, and the officer informed you of the result in two or three days." (Ev. 710.) The search in the calendar thus made, for each year and under each name, formerly cost 1s. Mr. Hewlett thus describes (Ev. 755) the application of this principle of charge: "Suppose a property conveyed from A. to B., the index would be under the letter B. Suppose it was conveyed to B., C., D. and several others, if I did not find it under B. I should search under C. They only enter references to deeds under one name of the grantees, and I might have to search under the whole of the names for 10 years. In that case the rules of the office would treat the search under each name as a distinct search." Mr. Grimaldi also, a well known record solicitor, related a case to the Commons' Committee on the Record Commission, where he would have paid 15*l.* for the search alone. Poverty could not afford the search, and the parties went to trial without it (Ev. 6533). Mr. Grimaldi may now go to the Rolls and search himself every public calendar and index in the office for the whole day at the cost of 1*s.*, and poverty may enjoy the luxury of establishing its rights. Taking down each roll, which formerly cost 2*s.* 6*d.*, is now 1*s.*; or any number of rolls in one search (if we understand the table of fees correctly) is 5*s.*

But the greatest relief at the Rolls Chapel is the privilege which the public now enjoy of making notes or copies of the record in pencil. Under the old system, not a single stroke of pencil or pen, as a memorandum, was permitted, though you might read over an acre of letters patent. If you happened to want only an extract of three lines out of five thousand, you were obliged to have the five thousand if costing less than 12*l.*; or, as a special favour, you might have the three lines for five guineas. But you were not allowed to compare it with the original (Ev. Hewlett, 730); so that to obtain a copy for evidence you were compelled to take the

whole document. *Inquisitiones post mortem* at the Rolls Chapel sternly insisted on being copied at full length, and no extract whatever was allowed. For 1s. a week, the new rules permit you to copy these yourself.

The reduction of the fees for producing the records themselves in the courts of justice or in Parliament, is very great. The ancient practice was to charge a guinea a day for every record, whatever the number might be, beside the transcription, whether made or not (Ev. Hewlett). Frequently the same records were carried down day after day. Sir Harris Nicolas gave the Committee several specimens of these charges. During the Braye peerage case, attending the House of Lords for four days with eleven records cost forty-four guineas (Ev. Nicolas). All these and other cruelties have been consigned by Lord Langdale to the tomb of the Capulets and have become matters of history. Let us rejoice, therefore, in the change, and say nothing more about them.

There is, however, one feature in the new rules to which the attention of the profession should be especially directed. Hitherto it has been the custom to obtain proof of the authenticity of the copy of a record through *vivá voce* evidence. To prove a single copy at the assizes an agent was generally brought from the metropolis. This costly process is wholly superseded. The act authorizes the delivery of copies officially authenticated by the seal of the public Record Office, and the signature of an assistant keeper, and constitutes such copies equivalent in validity with the original and admissible in all courts of justice as perfect evidence. Instead of sending a record agent from London to York, at three guineas a day, all the ends of justice will be met by dispatching an authenticated copy of a record by the penny post. This enactment will be of great use in perpetuating copies of records which in a few years will be altogether illegible. The price fixed for copies seems very reasonable, and in all cases is a reduction on the old charges. We have little doubt when the new system is more generally known, that it will yield a greater amount of fees than the old one. At very trifling cost any one, the title-deeds of whose property is to be found among the public records, is able to procure copies of them, which will serve as perfect evidence for all

time: and it may be expected that this facility will open a new and very legitimate source of fees, which will aid in defraying the cost of the new establishment.

A few years must be permitted to elapse to show the fruits of the altered custodyship—in the better preservation, and the establishment of a methodical arrangement of the records, and improved means of reference to them by calendars and indexes. In the present state of the offices, we cannot too heartily respond to the sound opinions of the deputy keeper, that “it is exceedingly desirable that the operations of the record establishment should be uniformly and unremittingly directed to the arrangement and classification of the records.”¹ “It is indispensable,” he elsewhere repeats, “that the contents of the several repositories should be in *the first place fully and clearly ascertained.*”

Extensive discoveries we believe remain yet to be made in almost every office.² However unostentatious and mechanical the labour of classifying and arranging records may be, it is that which is most wanted in the present state of the public records. The physical condition of great numbers in most of the offices demands immediate attention. The account we gave of the arrangement and preservation of the contents of the chief repositories in 1837 (vol. xvii. p. 101), with some modifications (as respects the miscellaneous records of the Remembrancer, of the Exchequer, and the Exchequer of Pleas), would suit the present time, and there is no occasion to repeat it on the present occasion. Even at the Tower, where the contents are better known and arranged than in any other

¹ First Report of Deputy Keeper, p. ix. x.

² There is in the appendix to the Deputy Keeper's Report a very clear and useful account of a personal survey made by Mr. W. H. Black into the state and quantity of the Welsh records.

These records are deposited at Chester, Poole, Ruthin, Caernarvon, Dolgellau, Brecknock, Presteign, Cardiff, Caermarthen, Cardigan, and Haverfordwest. The Deputy Keeper says, “the state of these records is on the whole very unsatisfactory. Dispersed in various repositories, without any regular or efficient custody, uncalendared, unsorted, and liable to injury and dilapidation, it may probably be found expedient that they should be removed to London.”

There can be no doubt, we imagine, of the necessity for their removal to London, and probably space could be found for them in the White Tower. In a few years the railroads will render it an easier task for a resident at Swansea to journey to London to make a search, than he could do to Caernarvon at the present time.

office, there is full employment for half a dozen workmen to bind and repair the records, and preserve them from future injury. We suspect that a similar number might be as usefully employed on the miscellaneous records of the Rolls' Chapel. The state of things at the Chapter House, since Sir F. Palgrave told the Commons' Committee "that the great majority of the records could neither be preserved, nor arranged, nor even consulted" (Ev. 4344), does not appear, from any report we know of subsequently published, to have been much improved. The masters of the Common Pleas state the arrangement and preservation of the records of the late Custos Breivium to "be very bad."¹ For these, as well as for the Common Pleas Rolls at Carlton Ride, workmen are required. Our own knowledge of the state of the records would lead us to think that a force of fifty workmen and boys, at an annual expenditure of 3000*l.*, might be judiciously employed in the arrangement and preservation of the contents of the several offices, and that even with these means good order preparatory to the removal of the records to a general repository would scarcely be obtained by the time when such a building was ready. It is abundantly evident that Lord Langdale is quite sensible of the importance of this apparently inferior work as the real basis of future operations, and we have the fullest confidence that his lordship's convictions are not likely to remain quiescent.

No satisfactory improvements in the condition of the present record offices can be hoped for. The description which the report of the Commons' Committee gave of them seems to be quite corroborated by the report of the Deputy Keeper. He says: "Of these repositories some are exceedingly insecure, and no one perhaps can be said to be completely fire proof; others are liable to damp, and so ill adapted to the reception of records, that the documents cannot be consulted without much inconvenience; and from the return of the registrar of acknowledgments it will appear to your majesty that some very important records have lately been destroyed or damaged by fire."²

¹ Appendix to First Report of Deputy Keeper, p. 39.

² First Report, p. 5.

“The dangers which the records thus sustain, and the inconveniences resulting from their dispersion, prove the necessity of speedily providing a proper repository for them; and until such a building be erected, it is humbly represented to your majesty that it will be impracticable to ensure the safety of the records, or to give full effect to the operations which their present state and condition require.”

All parties, the House of Commons, the late Record Commissioners, and recently the Select Committee of the House of Lords, are now agreed that a general repository is essential to the good management of the public records; and the Lords of the Treasury entirely concur with Lord Langdale in thinking that one General Record Office, under efficient management and responsibility, is essential to the introduction of a perfect system.

Two sites for a General Record Repository have been mentioned as suitable: the Rolls' estate in Chancery Lane and the new Houses of Parliament at Westminster. In the one case, a special building will be erected; in the other, one which would be comparatively useless will be turned to account. The superior convenience of the first site to the legal profession cannot be doubted for an instant. Westminster would probably never have been thought of but for the accident of the Victoria Tower. We observe that Lord Langdale considers the Rolls' estate as most convenient. The question in selecting one or other of these places seems to be: is the convenience of the legal profession in the searching of records worth purchasing at the cost of a special building, involving an expense of several thousand pounds,—certainly not less than fifty? The very nature of a record search makes it a matter which may or may not be expeditiously despatched. The time which most kinds of labour occupy can generally be defined;—not so with inquiries into records. You may chance to pitch upon the information wanted immediately, or you may be searching for it for days or even months. If record-searching were like banking,—if the solicitor were likely to go to and from his chambers in the Temple, or Lincoln's Inn and Chancery Lane, constantly during the day,—we should not hesitate to pay a high price for that convenience which would expedite the business most; but as the time in its execution

is altogether uncertain, as the searcher cannot say beforehand whether his investigation will occupy several minutes or hours, we are inclined to think it not of much importance that a fifteen minutes' walk is added to his labour. It seems not worth saving at a purchase of 50,000*l*.

Collect the records from the twenty different parts of London into one spot : release the searcher from journeying from the Tower to Westminster, and from Westminster to Chancery Lane, and he will gratefully betake himself to one repository, let it be placed even in the dome of St. Paul's.¹ The Victoria Tower will necessarily be a more durable structure than any record office likely to be built, and this is a consideration not to be slighted. The records, after their constant migrations, need the comfort of a resting place as perpetual as it can be made. Not overlooking historical associations, we may remark, that locating the records at Westminster would only be the restoration of the majority to the spot where they originated, and formerly rested. Moreover, as the Treasury appear to prefer the Victoria Tower, we, anxious to have a general repository with the least delay, are inclined to foster that notion, as being likely most speedily to realize our object.

The Lords of the Treasury observe, " that the records now kept at the Chapter House in Palace Yard, Carlton Ride, Spring Gardens, and Whitehall Yard, are all in the vicinity of the Houses of Parliament ; and that, consequently, so far as these records are concerned, there could not be any greater inconvenience felt if the western side were selected than that which now exists ; and also that it has been determined by parliament that the Victoria Tower shall be erected ; if that building can be adapted for the safe custody of the records, the expense to the public of a second building will be altogether avoided."

Moreover, esteeming Mr. Barry as we do the first architect of our day, we are eager to seize the opportunity of profiting by his genius at once in the construction of a record repository. At all events, whichever site is chosen, let us have the decision as soon as possible. For, the plan being fixed, the archi-

¹ If for any reason yet unforeseen the Victoria Tower should not be appropriated, we throw out for consideration whether the White Tower would not make a very good office.

tect, in conjunction with the deputy and assistant keepers, may settle much in the preparation of presses and boxes, which will help both the present and final arrangement of the records, and economize that outlay in merely temporary measures which would otherwise be necessary.

In prosecuting measures for the better preservation of the records, it is necessary to guard against the error of bestowing equal care indiscriminately on all. There is much chaff which it would be wise to winnow from the wheat. We are no advocates for a destruction like that to which the Pell Records were recently subjected. We would even carry our conservatism so far as to keep every thing which had the slightest *curiosity* about it. But there is an enormous quantity of parchment and paper about the affairs of those poetical persons Messrs. Doe and Roe,—bail pieces of renowned Smiths, and Browns, and Greens, &c.—affidavits, declarations, &c. touching matters which have long since vanished out of existence and memory. In the Queen's Remembrancer's Office there are some hundred bushels of coast bonds utterly useless and in great confusion. Assuming them to be of some possible use,—assuming that some ardent disciple of Mr. Sylvanus Urban desired to find out whether a shipment of a chaldron of coals paid duty at a certain port, we must say that the utility would be altogether incommensurate with the cost of arranging them. They ought to be consigned to the glue makers without delay. A safe test of worthlessness, before any records are destroyed, would be found in allowing the British Museum, or any museum, to make selections from the condemned lot for curiosity's sake. This precaution would at all events save public funds from the repurchase of public property.

Whilst the new establishment is provident of records already existing, it is necessary to bestow a thought on those to be created hereafter. In many cases, altered circumstances have rendered the ancient modes of making up records unsuitable. The practice of stringing records on files,—indifference to the size of the paper and parchment on which the record is written,—to the legibility of the handwriting, to the durability of the ink,—all suggest serious considerations, if it be

thought desirable to be consistent throughout in the management of the public records.

The improvement of the existing calendars and indexes, and the construction of new ones, though works of the greatest importance, are secondary in the order of proceedings, until the records themselves are mechanically well arranged, and a complete inventory, as it were, has been formed of the whole. Indeed in many instances a good local arrangement of some of the records almost supersedes the necessity of a calendar.¹ The discussion of the principles to be adopted in the formation of calendars may therefore be more conveniently postponed until further progress has been made in the works which have a prior claim to be executed. The annual reports of the deputy keeper will furnish frequent opportunities to discuss future measures, and inform our readers of the working and progress of the new system.

In concluding these remarks we may express our sincere hope that the present Master of the Rolls may live to see his reformation of the record system, so well begun, completed, or at least carried safely into port ; and we are sure we may already express, in the words of the Lords of the Treasury, "the deep obligations which the public owe to Lord Langdale for the attention and labour which his lordship has been pleased to bestow on a subject in which many important interests are involved ; but which is not directly connected with the judicial functions of the Master of the Rolls, though zealously and most efficiently performed by Lord Langdale."

¹ Court or manor rolls for example.—Let all records of this class be brought together, and formed into one series ; each manor being arranged first alphabetically, and then chronologically. When this arrangement is completed, little else can be done to facilitate searches. The same principle would apply to ministers' accounts, &c.

ART. VIII.—RATEABILITY OF PROPERTY OCCUPIED FOR PUBLIC PURPOSES.

No portion of our law calls more loudly for speedy and complete revision than that which regards the imposition of rates, including under that comprehensive term, not merely the established grievances of poor's rates, county rates, and church rates, but all the other varieties of parochial burdens which property has to bear, for protection or convenience, or for the amusement and employment of the various local bodies which control the affairs of this as yet free and uncentralized community. This is a subject the difficulties of which are daily forcing themselves more and more on general as well as professional attention.

The object of Mr. Poulett Scrope's or the Parochial Assessment Act was good : the practical working of it has fallen far short of expectation ; while the studied ambiguity of some of its clauses has opened the way to very extensive litigation. The defective execution of it has arisen entirely from the legislature having overlooked the result of the mode in which the county rates are assessed, namely, in proportion to the amount of poor's rate levied on each parish : which of necessity rendered the parishioners, and those employed on behalf of them, anxious to lower as far as they could the total value of the hereditaments of the parish. The farmers of parish A. were singly interested in having a fair and equal rate as between themselves, and consequently none of them could lose any thing by a rating to the full amount. But they were also jointly interested in cheating, if possible, the farmers of parish B., by lowering the whole amount of their own assessment, with a view to the county rate. Most country parishes felt and acted on this view of their own interests, and the consequence is, that, so far as our experience has gone, the assumed sum has in most places fallen absurdly short of that net value at which the surveyors, by act of parliament, were bound *on oath* to assess it. When will our legislature learn the folly, as well as iniquity, of imposing oaths in any single case, except where the legal punishment of perjury is not only expressly attached, but the perjurer is in reasonable peril of its execution ? The only modes in which the legislature

could have hoped to attain the correct value of premises for purposes of rating, were either to have altered the mode of assessing the county rates, or to have fixed it by one uniform valuation throughout the country by disinterested valuers. And as this can only be done at an enormous expense, and that expense, from the rapid alterations in the relative value of property, must inevitably soon recur, we are inclined to think that the former expedient must eventually be resorted to.

The other difficulties upon the act which have arisen, as we said, from the studied ambiguity of its clauses, are well known, nor is it our purpose at present to do more than advert to them. All mention of the rating of stock in trade, or, we should rather say, of "inhabitants" as such, was carefully avoided. The Poor Law Commissioners took silence for repeal; the Court of King's Bench, in the case of *The Queen v. Lumsdaine*, considered it to imply confirmation. But a more serious question arose immediately afterwards. The omission to rate profits or capital had been pretty general throughout the country. There had consequently been a constant dispute between the productives and the non-productives—to state the question broadly,—whether it was just to rate the former at a part of their income, and the latter at the whole; or whether an abatement should not be made in the assessment on the latter, proportional to the amount of an hypothetical assessment on the profits of the former. The church, or more properly the tithe-owner, was one of the parties interested in this controversy. It was thought by many that the case of *The King v. Joddrell* had secured for him the abatement for which he contended. He feared to lose this supposed advantage by some hostile construction which might be put upon the new act. The "friends of the church" therefore framed a clause for his protection. But *to speak out* on the subject would have provoked the immediate hostility of the hosts of irregular combatants who are always hovering about the church's intrenchments, and ready to take advantage of any unlucky demonstration on the part of the garrison. With considerable caution, therefore, they provided only "that nothing herein contained should alter or affect the principles or different relative liabilities (if any) according to which different hereditaments are now by law liable;" an innocent provision

in seeming, over which the eye of unwary Radical, or simple Dissenter (if such there be), might wander unconscious of the meaning that lurked below. Unfortunately, the contrivance was a little too fine. The Court of King's Bench decided, in *The Queen v. Capel*,¹ that the words did not on the face of them convey anything like the meaning which the unlucky friends of the church intended they should, and that they constituted no prohibition whatever. Seriously, this is a striking instance of a defect in our legislation of very common occurrence; namely, the employment of general and vague expressions in provisions of importance, lest more special words to the same effect should attract the notice of a hostile party; an artifice which very rarely succeeds, enemies as well as friends being sufficiently on the alert: but which first produces litigation, and then throws on the judges the difficult task of interpreting studied obscurities, and the unpopular duty of frustrating, in many instances, what was known *ab extrâ* to be the spirit of an enactment.

As it is not our present intention to renew the discussion on the subject of the rateability of tithe, we need only remark at present that, in our opinion, as in Mr. Jones's, the case of *The Queen v. Capel* has by no means settled the real question at issue. That question is, whether a rate, assessed in the proportions there complained of, is equal as between all the rateable inhabitants of the parish. The Court merely decided that it was equal as between the occupiers of hereditaments, considered as such, which was all that it was called upon to decide by the terms of the case.

The bill for the abolition of the rating of stock in trade has now passed as a temporary measure only. A more general and comprehensive enactment has been repeatedly announced; the chief difficulty in its way, in the present state of parties, we really believe to be the hostility between them as to the liability of tithe; but, quite independent of this party struggle, there are so many difficulties in the way of a statesman-like and real reform, and so many encouragements to proceed by the patching and cobbling method, that we have little hope of the result, until a more auspicious era for legislation commences.

¹ A full "Report of the Arguments" in this case has been published separately by Mr. Hodges, one of the counsel for the tithe-owners.

But it is our wish on the present occasion to direct our readers' attention to the state of the law on another subject of much importance to the occupiers of rateable property: namely, the non-rateability of the occupiers of such property as, in construction of law, is held to be public. Upon this subject, the course of precedent had already proceeded so far that the judges have found no other alternative than to carry it by their recent decisions to an extent which exempts a formidable show of the property of the country from contributions to the public burdens usually comprehended under the name of rates.

It was early established, and the cases are too familiar to render it necessary even to refer to them on the present occasion, that there could be no rate upon property unless in the *beneficial* occupation of some one. But, to use the language of the Court of King's Bench, in the *Governor of the Bristol Poor v. Wait*, 5 A. & E. 7, "the presumptive liability arising from occupation was to be explained away in each case."

This principle was applied :—

1. To the case of *public* property in the general sense of the word. Crown lands, *Lord Bute v. Grindall*, 1 T. R. 338; barracks and other buildings for military purposes, *Lord Amhurst v. Lord Somers*, 2 T. R. 372, in which Ashurst, J. says, "It is admitted that neither the possessions of the crown, *or, of the public*, are liable to be rated to the Poor;" *Rex v. Terrott*, 3 East, 506.

2. To the case of property devoted to charitable purposes, which in the contemplation of law are the same thing with public purposes; *The Attorney General v. Aspinall*, 2 Myl. & C. 613; *R. v. Waldo*, Cald. 338; see *R. v. Governors of St. Luke's Hospital*, 2 Burr. 1053; *Rex v. St. Giles's*, 3 B. & Ad. 573; *R. v. St. Bartholomew the Less*, 4 Burr. 2435.

In both these classes of cases there is certainly in one sense of the word a beneficial occupation; for the inmates of a barrack or a hospital unquestionably derive a benefit from their occupation. "It cannot be said" (to use again the language of the court in the *Bristol Poor* case,) "that no benefit is derived." It is therefore rather to be regretted that a confusion of language has been introduced into some of them by the employment of words in a far-fetched sense. In

R. v. Terrott, 3 East, 506, Lord Ellenborough says, "the principle of the subject is, that if the party have the use of the building or other subject of the rate as a mere servant of the crown, or of any public body, or in every other respect for the mere exercise of public duty therein, and have no beneficial occupation of or emolument resulting from it *in any personal or private respect*, then he is not rateable."

There is perhaps in this dictum, and others on the subject, an endeavour at over-defining the principle—an attempt to raise a distinction which the mind endeavours to conceive but cannot really express—for any benefit derived by an occupier must surely be "personal and private" *to him*. If the broad ground had been uniformly taken, that occupation for public purposes, or occupation by the objects of a charity (which is a public purpose), whether it be beneficial or not, is not such an occupation as is contemplated by the act of Elizabeth, some contradictions would have been avoided. For instance, it would scarcely have been held that soldiers are not rateable for barracks, but that the master gunner of a fort is for the battery house (*R. v. Hurdis*, 3 T. R. 497); that pauper lunatics are not rateable as occupiers of a hospital (*Rex v. St. Bartholomew the Less* and *R. v. St. Giles's*) but that the tenants of an almshouse, maintained solely by the charity, are (*Rex v. Munday*, 1 East, 584). These were probably decisions influenced by the particular facts of the several cases; but they stand in our books as authorities establishing exceptions to a principle; and if they are not maintainable, it is much to be wished that they were formally overruled.

3. Property dedicated to religious purposes. Here there is properly speaking no beneficial occupation at all, consequently no person rateable, and this appears to be the ground of the decisions; for it does not appear to have been distinctly laid down that the dedication of property to a dissenting-meeting house, for instance, is a public purpose; see *Robson v. Hych*, 1 Cald. 310; *Rex v. Agar*, 14 East, 256; 3 & 4 W. 4, c. 30.

4. Next follows the class of cases in which property has been held exempt from rateability on the ground of its devotion to what may be constructively termed a public purpose. Where the employment of income is so controlled, by act of

parliament or otherwise, that, after payment of charges and incumbrances, the *ultimate* surplus must be enjoyed by *the public* in the shape of convenience or utility, without the possibility of personal and pecuniary benefit being derived by any one from it, it is exempted from contribution to the rates, there being no beneficial occupier who can be rated. The cases on this head are numerous and familiar, and commonly relate to undertakings for local improvements, in which the money has been raised by borrowing under the provisions of acts of parliament, and tolls are appropriated to the purpose of paying off the incumbrances, to cease when these incumbrances are paid off.

In the well known case of *Rex v. the Commissioners of Salter's Load Sluice*, 4 T. R. 730, the defendants were assessed to the tolls of a sluice which, by the act of parliament passed for the supporting of the sluice, were "to be applied for the several purposes of the said act, and for no other whatsoever;" Lord Kenyon said: "It is not sufficient to point out property within the parish, but there must be also some beneficial occupant or occupants. Corporations may unquestionably be rated. Here there is property which is the subject of a rate, but there is no occupier of it."

In *Rex v. Liverpool*, 7 B. & C. 61, the property in question belonged to the trustees of the Liverpool Docks; and the employment of it was according to the provisions of an act of parliament, directing that, as soon as mortgages and other encumbrances should be paid off, the rates should be lowered as far as could be done, leaving sufficient for charge of management, collection, improving, maintaining and repairing the docks, and carrying into execution the purposes of the act. This proviso was held by the Lord Tenterden to exclude the possibility of a beneficial occupation, and the property was therefore held not rateable.

See also *Rex v. the Commissioners for Lighting Beverley*, 6 Ad. & E. 650; *Rex v. Hull Dock Company*, 5 M. & S. 394; *Rex v. the Justices of Worcestershire*, 9 Law Journal Reports, M. C. N. S. 17, in which latter case there was a beneficial occupation by some of the body, but it was held impossible to rate the *whole* body, who neither did nor could occupy the property beneficially in their general character.

5. It must be admitted that there is a considerable difficulty in principle, and some on the authorities, in distinguishing the employment of property beneficially for the public, and beneficially for a class of individuals. Unquestionably there might be a beneficial occupation in respect of *a class* as well as in respect of an individual; as in those cases where trustees have been rated for the property of charitable institutions, because some of the individuals benefited by them contributed towards their expenditure; *Rex v. St. Giles's, York*, and *Rex v. Sterry*, which will be considered afterwards. So again, before the Municipal Reform Act, the property of municipal corporations was liable to the rates, although in many instances the benefits of it were enjoyed by whole classes of individuals, such as freemen; *Rex v. Watson*, 5 East, 480; *Rex v. Trustees of Tewkesbury*, 13 East, 156. It must therefore be decided, in each separate case, whether or not the ultimate benefit is really derived from what may be constructively called *the public*, or by *a class* only.

In the case of *Rex v. the Trustees of the River Weaver Navigation*, 7 B. & C. 70, n. the purposes to which the surplus produce of the tolls were to be applied according to the act, after the charges of the work, were towards "amending and repairing the *public* bridges within the county of Chester, and such other *public* charges within the county, and in such manner as the justices of the peace at the Michaelmas Quarter Sessions shall yearly order, direct, and appoint." It was also provided, inasmuch as the roads leading to the river would be injured by the increased traffic upon them, that so much of the rate as the justices might think fit should be expended in repairing those roads, and that, if any surplus remained, it should be expended in repairing such other highway in the county as the said justices in sessions should appoint. Now here it certainly seems open to contend that there was a beneficial enjoyment of the funds by *a class*; namely, the contributors to the highway rates of the county of Chester, or rather of such portions of it as the justices might think fit to select for the perception of these advantages. Whatever may be contributed from the Weaver Navigation tolls for the repairs of roads, is so much saved to those who by law are taxable for that repair. The parishio-

ners of the parishes through which the navigation passes are thus burdened, by the exemption of its property from the rate, for the benefit of other *classes* of individuals. The court, however, decided otherwise, on the broad ground that "these were public purposes; and, as no part of the monies received could be applied to private purposes, the monies were not rateable in the hands of the trustees."

By sect. 92 of the Municipal Corporation Act, it is provided that the rents and profits of all hereditaments, and the annual proceeds of all monies, &c. belonging or payable to the corporate body, shall be paid to the treasurer of the borough, and carried to the account of *the borough fund*. After the passing of the Act, therefore, the rateability of corporation property depended on the question, whether appropriation to the borough fund was or was not a public purpose. This question was decided in *The Queen v. The Mayor, &c. of Liverpool*, 9 A. & E. 434. According to the Act, after the payment of debts, salaries of officers, and other specified borough expenses, the surplus is to be applied for the "public benefit of the inhabitants, and the improvement of the borough." It was argued with much ability by Mr. Cresswell, (and the same line of argument was adopted in the later case of *The Queen v. Exminster*, by Sir John Campbell,) that the parties benefited by the expenditure of the borough fund were not the public, but *a class*. But the Court decided against the rateability: and with especial reference to the authorities of the *Liverpool Docks* and *River Weaver* cases: "We feel it impossible to distinguish these cases, and especially the latter, from the present. The extent and approximation to something like national benefit are in kind, and almost in degree, the same. The *public*, in the one case, is the same town of Liverpool; in the other, the county of Chester."

In *The Queen v. Exminster*, decided in last Trinity term, but not yet reported, the only difference from the *Liverpool* case consisted in the fact that the property of the *Exeter* corporation, which it was there sought to rate, was situated in parishes at a distance from the city. It was, in fact, rather an endeavour to induce the Court to reconsider its former judgment, by the exhibition of extreme cases, than to establish any difference in principle. For the former cases

having all gone upon the ground of the publicity of the purpose, it was clear that the principle could not be varied by the fact, that the parties who suffered by the exemptions of the property from the rates were not residents within the borough. The Court confirmed the former decision.

6. Cases in which to impose a rate upon property would merely have the effect of increasing, by the amount of that rate, the contributions of rateable inhabitants to some other assessment.

We do not remember any instance in which this principle has been distinctly applied to the decision of a question of rateability. But it has been frequently alluded to by judges, as strengthening the grounds of their opinion. In the *Beverley Gas Work* case, 6 A. & E. 650, the commissioners imposed rates for the expenses of lighting the town; they had formerly obtained gas from a contractor; they now (with money borrowed on mortgage) purchased land for the purpose of erecting gas works, under the authority of an act of parliament: and the question was as to their rateability for this land. Mr. Justice Littledale says, "They now manufacture the gas themselves. Whatever saving they effect by this, goes to reduce the rate, and saves so much to persons liable to the poor-rate. If the commissioners are rated to the poor for this, they must increase their rate upon the town. It is as broad as it is long." Similar language is held by Patteson, J.

7. If property be situated in one parish, and all the benefit resulting from its employment be derived in another, it is not liable to be rated in the former. This was established in *R. v. Sculcoates*, 12 East, 40. The lands there in question had been purchased by commissioners, and converted into a drain; but the low grounds drained by it, which were much raised in value by the change, were situated in other parishes. Lord Ellenborough said, "There is no benefit received by these commissioners for themselves, or others within this parish, which is capable of being rated. . . . I know of no instance where a canal company has been held rateable for the mere space occupied by the canal in a particular parish, if no tolls were received or became due there; and I cannot distinguish between a drainage and a canal." See also *R. v. Kingswinford*, 7 B. & C. 237; *R. v. Monmouthshire Canal*

Company, 5 N. & M. 68. The case of *R. v. Oxford Canal Company*, 10 B. & C. 163, (in which the company were rated for the whole of their canal in a parish, although by their act they were prevented from taking tonnage for particular goods for the space of two miles in that parish; there being, as it was contended, a compensation given them for this omission, by the right to take certain other tolls elsewhere out of the parish,) seems a little difficult to reconcile with this principle, although Bayley, J. put the decision on the ground that the two miles in question contributed to *earn* the compensation tonnage.

We now come to certain classes of cases nearly allied to those already analysed, and often scarcely distinguishable from them without minute observation, but in which the exception contended for has not prevailed. They may be divided into the following:—

1. Cases in which the ultimate purpose to which the property is applied is *partly* beneficial to individuals. Wherever, for instance, property is vested in the hands of trustees for a public object, but with power to them to allow a certain beneficial enjoyment of it by individuals beyond what is absolutely necessary to secure that object; either the individual is rateable, or the trustees become rateable *quoad* his occupation. “As soon as any independent occupation for private advantage is discoverable, rateability immediately attaches;” *Governor of Bristol Poor v. Wait*, 5 A. & E. 7.

For instance, where some of the partakers in the benefits of a charitable institution are not in the class of paupers, there is a beneficial occupation. Thus, a lunatic asylum partly occupied by pauper lunatics, and partly by others who paid for their admission, was held to be correctly rated, although in point of fact no profit was made of it, the contributions of the affluent going in aid of the charitable part of the institution; *R. v. St. Giles's*, 3 B. & Adol. 573. So in the case of *Regina v. Sterry*, (decided last term, and not yet reported,) the trustees of a Quaker school, into which a number of children wholly maintained by the charity were admitted, along with a few who paid part of the expenses of their education, were held rateable.

So although there is no beneficial occupation of property

formerly devoted to religious purposes, yet any employment of a part of the funds of a religious institution for the benefit of an individual, as the payment of the salary of a minister, seems to render the trustees rateable; *R. v. Agar*, 14 East, 256.

But the occupation of a portion of property, devoted to public or strictly limited uses, by servants merely for the purposes of the institution, does not occasion rateability; though, if the servants occupy in any degree for their own benefit, rateability attaches. It must be confessed that some of the distinctions here run very fine: as those of the soldier in barracks and the master-gunner of a fort, already adverted to. It may be thought that others rest on a distinction difficult to maintain on principle; viz. that trustees cannot be rated for the occupation of a servant, while the servant himself may.

So the trustees of a lunatic hospital are not rateable for the occupation of a principal hired servant *living in the hospital*, *R. v. St. Luke's*, 2 Burr. 1053; *R. v. St. Bartholomew's the Less*, 4 Burr. 2435; or a municipal corporation for a fund out of which their officers' salaries are paid, *R. v. Liverpool*, 9 A. & El. 435; but the master of a free school was held rateable, *R. v. Catt*, 6 T. R. 332; an artillery officer residing with his family in barracks, *R. v. Terrott*, 3 East, 506; the comptroller of Chelsea college residing in it, *Ayre v. Smallpiece*, 1 Bott, 154; the surveyor of a navigation, 2 Stark. c. 543; a keeper in a royal park, *R. v. Matthews*, 1 Bott, 170.

"The property of the crown," says Lord Ellenborough in the second of these cases, "in the beneficial occupation of a subject, whether he be a civil or a military officer of the crown is equally rateable. But if the use of, or residence upon, the property be either as the servant of the crown and for public purposes only, or as a mere public officer or servant, the parties having the use of the property merely for such purposes are not rateable: because the occupation is throughout that of the public, of which public occupation the individuals are only the means and instruments."

2. It seems to be the general result of the cases to which we have directed the reader's attention, that the question, whether or not property, producing an income, be rateable, depends upon the character of the *ultimate purpose* to which

the property and income are applied. If that purpose be of a public character, rateability will not attach, although a portion of the income goes into the pockets of private individuals in the shape of interest for money advanced by them. Thus in the numerous cases of property devoted to public undertakings, there have been mortgagees, annuitants, and other creditors; to be paid either their interest, or both interest and principal, before the public purpose could be satisfied. In the Liverpool Dock case, all the principal monies which had been borrowed were to be repaid, and all assignments and mortgages upon the rates satisfied and redeemed, before the rates and duties could be lowered, and the amount of the bond and other debts due on the property was expressly found. In that case, the attention of the Court was not indeed called to the circumstance; but in *The Queen v. Exminster*, the fact, of the income arising from the property being liable in the first instance to payment of the interest of a heavy mortgage, was strongly pressed on the judges, and it was contended that there was at least a beneficial occupation in respect of the mortgagees. But no notice was taken of this point in the judgment: it appears to have been considered too untenable for discussion.

There is, however, one recent authority which certainly appears to disturb this recognized principle. It is that of *The Queen v. The Company of Proprietors of Blackfriars' Bridge, Manchester*, 9 Ad. & El. 828. The company was empowered by its act to raise a sum of money in 50*l.* shares. This money was to be expended in discharging the expenses of the act, making the bridge, and purchasing the necessary land. The company was also empowered to raise a further sum either by fresh shares or by mortgage. The tolls to be raised were to be applied—1. To keeping the bridge in repair. 2. To paying mortgagees and annuitants their interests and annuities. 3. As to the surplus, among the proprietors, at the rate of 5*l.* per cent. interest, in the first place, on the sum paid up on their shares. 4. After the opening of the bridge, *the proprietors were to receive a dividend of 7*l.* 10*s.* per cent.* 5. As soon as the surplus should be more than sufficient to pay this sum, the excess was to be applied in paying off the principal sums advanced by the proprietors: they were not to

receive more than 7l. 10s. per cent. upon such part of their principal as should remain, until the whole sum originally raised were paid off. 6. After this, the surplus tolls were to be devoted to the formation of a fund to pay off the mortgages and annuities, and to keep the bridge in repair. 7. When this last object was attained, *the tolls were wholly to cease and determine*. The company was held rateable.

It must be confessed that there is some difficulty in reconciling this case with those already mentioned, where there has been interest paid out of tolls to parties who have advanced sums for the completion of a public undertaking, and yet the perception of such interest has not been held to occasion a beneficial occupation of the land. In those cases there were, as has been seen, mortgagees to be paid, and yet rateability did not attach, the ultimate purpose being public. In the Blackfriars' Bridge case, there were, *first*, mortgagees to be paid; *secondly*, shareholders; then came the ultimate purpose, and rateability did attach.

Now it does not appear easy to establish a difference between one who advances money on mortgage on the security of tolls derivable from an undertaking and is repaid principal and interest out of those tolls, and a shareholder who advances money at a rate of profit absolutely fixed by the legislature, and is, in like manner, repaid his principal with that rate of profit, before the execution of the ultimate public purpose commences. The former receives, probably, $4\frac{1}{2}$ or 5 per cent. interest: the latter, in the Blackfriars' Bridge case, received $7\frac{1}{2}$ per cent. dividend. No surplus profit beyond this could find its way into the pockets of either. It is true that, in the former cases, the parties whom it were sought to rate were trustees only,—in the latter, the shareholders themselves; but this can make no difference; for there is no better established principle than that trustees may be rated as occupiers, if a benefit be derived by their cestui que trusts; *R. v. Parret*, *R. v. Agar*, *R. v. Watson*, &c.

And although an argument might possibly be attempted on the circumstance, that the mortgagees derive only the ordinary interest of money for their advances, while the shareholders, in the case in question, were to divide a larger annual profit whenever it was realized, yet no such distinction was taken by

the Court in any of these cases, nor will it stand for a moment the test of sound analysis. In the Blackfriars' Bridge case, Littledale, J. said, "Suppose a person of large property were to build a bridge for the benefit of the public upon his own land, but, *in order to reimburse himself for the expense*, were to take a toll from the persons who passed over it: there would be land which would be occupied; and, as tolls were taken, it would be beneficially occupied, and he would be rateable in respect of such occupation." The reasoning is perfectly clear and consistent with itself; but the difficulty is, to see why it does not apply as well to the common case of public property burdened by a mortgage, as to the special circumstances of that to which the learned judge applied it.

It certainly does appear as if to rate property by reason of its being subject to the payment of the interest and principal of incumbrances, the ultimate purpose being public, would be to sacrifice realities to names. A mortgagee is to receive five per cent. for his loan: the public are to enjoy the further income of the property: a rate is imposed: who pays it? Certainly not the mortgagee. He will receive neither more nor less than before. The public will really be losers by the whole amount. It is very true that in many of these undertakings (as in that of Blackfriars' Bridge, Manchester) there may actually be, where the question is raised, not only no surplus available for public purposes, but no reasonable probability of any. It may even be that the provision of the act respecting the ultimate purpose is often inserted merely with the view of evading liability to public burdens, in what is, substantially, a private speculation. But no principle is better established than that the Court will look to the terms of the instrument by which the disposal of property is regulated, and not to the actual condition of that property. This being the case, it certainly does appear to us that the only test of rateability which can be consistently applied is the *ultimate* purpose, whether that be public or private, beneficial or not beneficial to any occupier. We admit that the Blackfriars' Bridge case is not reconcilable with this view of the subject; and possibly others may be cited to the same effect; but we can extract no other doctrine from the general mass of authorities.

3. We have next to notice another class of decisions, distinguished only by a very narrow difference from those which establish the non-rateability of public property. These are cases in which parties, on whom public duties are imposed, have been held rateable, not because they derive any private advantage in the ordinary sense from the occupation of the property, but because that occupation is useful to them for the purpose of discharging those duties.

Governor, &c. of the Poor of Bristol v. Wait and others, 5 Ad. & El. 1.—In this case the plaintiffs had hired property, out of the limits of the city of Bristol, for the purpose of putting out their poor, either simply to lodge them, or to employ them, at their discretion. The defendants were overseers of the parish in which they were so put out. Held rateable. In this judgment the Court to a certain extent insisted on the fact that the property thus occupied was situate in a foreign parish, and that "it does not concern the overseers and rate-payers of that parish in what manner any persons manage the property held and taken in it. But on that foundation alone the judgment could not be supported, according to the principle (already adverted to) established in *R. v. Exminster*. It must be taken to rest on the general ground that the duty of maintaining the poor was thrown on the plaintiffs; that by occupying property for this purpose, they discharged themselves of a burden, inasmuch as they may have occupied property *somewhere* for the fulfilment of their duty; and that, in this sense, they had a beneficial occupation.

In *R. v. The Guardians of the Wallingford Union*, 2 Perry & Davison, 266, the same principle was laid down with greater distinctness. In this well known case the question was, as to the rateability of the guardians of an union, under the Poor Law Amendment Act, for its workhouse, situated in one of the parishes of the union. The Court laid it down as "the great principle of the cases as to the exemption of property, unproductive to the occupier, from rateability," that "when that person who must be deemed the actual occupier is merely a trustee for others, and prevented by law from deriving any benefit whatever from the occupation, he cannot be considered as the occupier, for the purpose of being rated." (This dictum, we apprehend, must be taken as applicable to

the case of trustees for the public only; for we have had repeated occasion to notice, that trustees may be rated if their cestui que trusts derive a profit, though they are prevented from deriving any; (see especially the language of Grose, J., in the old case of *Rex v. Agar*, and *R. v. St. Giles's*.) The Court proceeds: "The workhouse was hired by the guardians, under the authority of the late statute, for the public purpose of maintaining the poor, and with no private advantage to the occupiers. But although the maintenance of the poor be a public purpose, *the maintenance of the poor of this particular district is a burden upon that district alone*. The occupation is not beneficial to the guardians individually, *but the most advantageous mode of relieving their poor is an advantage to that body . . .* We decide upon the ground that this property, not being devoted to a public purpose, and being beneficially occupied, is subject to the poor's rate."

It is perhaps not very easy to distinguish these cases, according to the principles laid down in this judgment, from others in which property is exempted from the rate. Wherever an act of parliament makes men a body for the performance of certain functions, a duty or burden is imposed upon them. For instance, the trustees of the Liverpool docks were subject to the duty of managing these. They rented, as it was expressly found in the case, certain property for the purposes of the docks; they must have derived from that property the same species of advantage which the guardians derive from their workhouse, namely, the best mode of discharging their legal obligation. So again, every municipal corporation has local duties to discharge, and it seems hard to contend that they do not derive an advantage of the same kind in the discharge of them, from the property which they hold or occupy. The maintenance of "the poor" is a public purpose; so is the improvement of corporate towns, and the payment of the salaries of their magistrates; but if the maintenance of the poor of the Wallingford Union, be "a burden upon that district alone," and therefore not public; why not the lighting of Wallingford streets, and the payment of the salary of the Wallingford town-clerk?

If there be, however, any inconsistency in these decisions, (and we are by no means so confident in our own opinion as

not to admit that there may be distinctions which we have failed to perceive), it is perhaps fairly attributable to some desire on the part of the Court to escape from the consequences of decisions which have gradually withdrawn so considerable a portion of the property of the country from local taxation. If the poor's rates were a general tax raised by the central authority, there might be little hardship in exempting particular classes of property from it, on the ground of the public benefit derived from their present employment; and it might be far better for the public interest, that municipal corporations, and other bodies, whose expenditure is beneficial to large classes, should be exempt from the imposition. But so long as the tax is local, the hardship is enormous. A corporation may possess the best lands in a parish: by the management of its estates it may give to the full as much encouragement to pauperism as any other landlord, and all the pauperism thus produced is thrown for support on the possessors of the remainder, in addition to their own. The same crying evil constantly occurs in the case of lands used for public undertakings. There is also another mischief, to which we have already alluded. We have shown that, according to the course of authorities, it is at least doubtful whether a body of speculators might not escape the whole burden of rateability, merely by treating themselves in their Act as creditors of the undertaking, and introducing into it some ultimate public purpose, so distant as to be altogether visionary. We are not aware of the nature of the enactment on this subject, which it was proposed to introduce this session; but we cannot avoid expressing a hope, that, whenever any such is really proposed, its provisions will embrace all property whatever, which can be the subject of occupation; or that the exceptions, if any, will be such as are simple and intelligible, such as crown and national property in the ordinary sense.

M.

ART. VIII.—*The Practice of the Superior Courts of Law at Westminster in Actions and Proceedings over which they have a common Jurisdiction ; with Introductory Treatises, &c. &c.* By Robert Lush, Esq. of Gray's Inn, Special Pleader. London: Reader. 1840.

WE learn from the preface to this work, that the design of the author in composing it was, to present, in a condensed and convenient form, a complete guide to the practitioner in civil actions, with reference as well to the selection of the parties to the suit, as to the course of proceeding therein. But, perhaps the fairest and most satisfactory course is, to allow him to explain in his own language, both what he intended to do, and what he has succeeded in doing.

After setting forth the design of the work as above stated, he proceeds to say—"With this view he has given, in the form of an Introduction, a full treatise on the rights and liabilities which arise out of contracts of every description ; explaining and illustrating the rules which direct who, as between the original or substituted parties, and who, in the several events of marriage, bankruptcy, insolvency, and death, is the proper person to enforce the right, or to sustain the liability. In subsequent chapters, the same course has been pursued with reference to rights and liabilities arising out of torts, or transactions unconnected with contract. These treatises, in which will also be found, it is believed, all the information necessary in ordinary cases respecting the form of action, are preceded by a chapter on the jurisdiction of the courts, for the purpose of showing to what parts of the kingdom their process does not run, in what cases their jurisdiction may be repelled, and what rights cannot from their nature be enforced in this country ; and by another, showing in what cases an action is not maintainable by reason of personal disability.

"Another question which naturally introduces itself as a preliminary to commencing an action is, by whom the proceedings are to be conducted ; and this involves a consideration of who may and who cannot sue in person, who may and who must sue by attorney, or by prochein amy or guardian, as well as of the right of a *cestui que trust*, or person

beneficially entitled to the *chose en action*, to use the name of the trustee or person in whom the legal right thereto is vested. Each of these considerations forms the subject of a separate chapter.

"Then follow, as incidental to the same question, the power of suing *in formâ pauperis*; the law of attornies, embracing their qualifications, duties, liabilities, rights, and privileges, the delivery and taxation of, and the remedy for, their costs; and lastly, the duties, rights, and liabilities of town agents, both as between them and their immediate employers, and between them and the client.

"The practical part of the work, which has thus been disencumbered of much that is elementary and theoretical, is divided into three books. The first exhibits the *regular* proceedings in the suit, from the issuing of the writ of summons to execution, and from thence to the affirmance or reversal of the judgment by the House of Lords, as the ultimate Court of Appeal. It contains also the practice relative to the revision of the judgments of inferior courts, by writ of error and writ of false judgment.

"The second book treats of proceedings which are occasional and incidental; such as the holding to bail, the compelling an appearance by *distringas*, proceeding to outlawry, &c.; and of such isolated subjects as require a separate notice, as payment into court, affidavits, service of rules, practice at the judges' chambers, &c.

"The third is devoted to the actions of ejectment and replevin, and the proceedings by arbitration."—pref. p. v.—vii.

Of the mode in which the author has executed his task, it is difficult to speak in terms sufficiently commendatory. To great research, to a laborious compilation of all the minutiae, for which the practitioner is so frequently at a loss and for which he in vain has recourse to other treatises, Mr. Lush adds a brief and lucid exposition, an excellent arrangement, and a judicious analysis of all the cases which present any apparent inconsistencies.

The preliminary chapters on parties to actions, a subject which serves as a sort of connecting link between pleading and practice, will be found exceedingly useful both to attornies and

barristers. They contain, as the author justly remarks, all that is needed in ordinary cases, respecting the forms of actions, besides many valuable suggestions, not to be found elsewhere, as to the effect and operation of the new rules. Take as an example of the following :—

“ Where one of several joint contractors was not liable by reason of infancy, he could not before the new rules have been joined, for in the case of *Chandler v. Parkes*, 3 Esp. 76, where to an action for goods sold and delivered one of the defendants pleaded infancy, and the plaintiff entered a *nolle pros.* as to him and went to issue against the other, Lord Kenyon ruled that the plaintiff could not recover on such a record; that he ought to have discontinued and brought a new action against the adult defendant as being, according to the legal effect of the contract, the sole contracting party.

“ This decision was followed by Lord Ellenborough in *Jaffray v. Frebain*¹; but in *Gibbs v. Merrell*², where the plaintiff declared against one defendant on a bill of exchange accepted by him and another, to which the defendant pleaded the nonjoinder, and the plaintiff took issue on such plea, it was held that he could not recover, because the bill itself proved the averment that the defendant made the promise jointly with the other. And the Court observed that the plaintiff should have replied the infancy. Subsequently another action was brought against the same defendant, who pleaded in like manner the nonjoinder; the plaintiff then replied the infancy and recovered on demurrer to the replication.³

“ The late pleading rules appear to have altered the law of the two former cases. The plea of *non assumpsit* at that time put in issue both the making the promise in fact and its validity in point of law. The alleged promise in the declaration was therefore interpreted to mean a promise binding in law, and any defence which negatived such a promise by the two disproved the allegation. Hence infancy became admissible under the general issue. The effect was the same as if the plaintiff had joined an utter stranger. But as *non assumpsit* now puts in issue only the promise in fact, or what is equivalent for this purpose, the facts from which, *prima facie*, a promise is implied, the promise alleged means nothing more. Infancy therefore is directed to be specially pleaded, and as the contract alleged will be proved, if there is a plea of *non assumpsit*, or admitted, if there is not, this ground of objection is altogether removed.

“ In the Year Book, 32 H. 6, pl. 6, it is said, “ where an infant

¹ 3 Esp. 47.

² 3 Taunt. 307.

³ *Burgess v. Merrell*, 4 Taunt. 468.

and a man of full age were bound, or a *feme covert*, there the action shall be against both, and they shall have advantage by way of plea of the nonage or coverture." Thus infancy was no defence on the plea of *non est factum*, for it was still the bond of the plaintiff in point of form, though not in validity.

"It follows that an infant may now in all cases be joined without risk to the action, and if the disability be pleaded, the plaintiff may enter a *nolle pros.* as to that party, notwithstanding that he also pleads in denial of the contract.¹ Still the infancy may be replied as before to a plea in abatement, so that it is not necessary to make the infant a party."

We find him suggesting (pp. 79, 80) as the effect of the 9 Geo. IV. c. 14, and 3 & 4 Will. IV. c. 42, s. 10, that if any one of the parties to a contract be dead or out of the jurisdiction, the plaintiff may safely select as defendants which or how many he pleases. We have never before seen so clear, full, and satisfactory an exposition of what amounts to a surrender by operation of law of a tenancy from year to year or of the crabbed, much-talked of, but little understood principle of liability on covenants running with the land, as he lays before us in pp. 84, 85, and 31, 34. His explanation of the statute 32 Hen. VIII. c. 34, so far as it relates to the assignees of lessors and lessees is new and ingenious. The liability of attornies issuing irregular writs which are set aside, and of magistrates issuing void or irregular warrants, or acting without, or going beyond their jurisdiction, is clearly explained and illustrated by a great number of cases, (pp. 162—167.) The whole chapter on attornies is good, (pp. 211—299.) Into these 88 pages he has compressed all that practitioners can want to know as to their own rights and liabilities under almost any possible emergency.

He questions the propriety of the decision in *Tipping v. Johnson*, 2 B. & P. 357, that a new attorney may issue execution on a judgment without an order to change. As this is a matter of considerable interest, we give his arguments entire:

"This decision, which is the only one on the point, proceeds, it is conceived, upon a misapprehension of the cases on which it appears to have been founded. It is certain that for some purposes the authority determines with the judgment. Thus a writ of *sci. fa.*

¹ *Moravia v. Glass*, 2 M. & S. 444.

may be sued out by a different attorney, and under the old practice it could not be proceeded on by the original attorney without a new warrant being filed. But a *sci. fa.* is a new action requiring a new roll¹. The Court has also refused to quash a writ of error because it was brought by a different attorney². And it has been holden that the attorney cannot sign a note for expenses under the Lords' act³. The latter, however, is a proceeding *in pais*, quite beside the conduct of the action, and which cannot be comprehended under the authority to sue or defend. If the doctrine be correct, the opposite party may be placed in unnecessary difficulty. For it is clear that if the attorney gives him notice not to pay the amount to any but himself, claiming a lien thereon for his bill of costs, the party cannot justify the payment to any one else, even though he be taken in execution, for the notice operates as an equitable assignment⁴; on the other hand, if the attorney, unsuspecting a change, omits to give notice, he is in a worse position after he has incurred the expense of a judgment, and established his client's right, than if he left off in the middle, for though execution cannot be issued without production of the judgment paper, and that cannot be obtained without payment of his costs, if a different attorney can be vested with authority to issue execution, he may demand and receive payment without it. Besides, the opposite party would be subject to the same inconvenience in not knowing to whom he was to pay, or upon or from whom he was to serve or accept any notice or rule connected with the action, as the above rule was intended to prevent. Nor is it any argument the other way, that the opposite party may settle with the client, and provided there is no fraud or collusion, and no notice, defeat the attorney's lien, for that he may equally do pending the proceedings. The question is, whether the client can discharge one attorney and employ another at any stage before the record is completed without an order, which would secure to the former his costs, and without notice thereof to the adverse party. Both principle and authority, except in the case above mentioned, which appears to have been hastily decided, show that he cannot⁵."

He also questions the propriety of the decision in *Bowler v. Brown*, 2 Ad. & Ell. 116. This subject, also, being of con-

¹ *Burr v. Attwood*, 1 Salk. 89.

² *Batchelor v. Ellis*, 7 T. R. 337.

³ *Macbeath v. Ellis*, 4 Bing. 578. *Warrington v. Elliott*, Barn. 371.

⁴ See *Attorney, Lien*, post.

⁵ The award of execution is thus entered on the roll: "Afterwards, to wit, on the day of , the plaintiff comes here into court by his attorney aforesaid, and prays," &c.

siderable importance to our professional friends, we place the entire passage before them.

"Where the certificate is not taken out till after the 16th of December, it is to bear date on the day it issues, and to take effect from that time only. In the interval, the attorney cannot lawfully do any act as an attorney, and the consequence seems clear that he cannot recover his costs for business done during that time. The 30th section, above quoted, which creates the disability, makes it dependent upon either of two events: 1st, For not obtaining a certificate at all, or not entering it; and 2dly, For obtaining one of a smaller rate of duty, *with intent to evade the payment of the higher duty*. But the Court of Queen's Bench has lately holden, that whatever the purpose of the legislature might have been, as this section is framed, the last paragraph, '*with intent to evade the higher rate of duty*,' refers to both branches, and therefore that an attorney who did not take out his certificate till nearly the end of the year, viz. the 13th of November, was entitled then to sue for the costs of an action which had been concluded in the preceding August¹. It may be permitted to observe that were it not for the word '*higher*,' this construction might be better supported. The *intent*, if there be any, of not taking out a certificate, can only be to evade the payment of any duty at all. The phrase seems quite inapplicable to such a state of things. Where the attorney by reason of not taking out his certificate is disabled from recovering his costs, the courts will set aside a warrant of attorney and judgment thereon, or any other security he might have taken for the amount²."

On looking over the last part of Meeson and Welsby's Reports, we find the Court of Exchequer also throwing a doubt on the authority of that case³. Professional men should therefore be cautious in relying too much on it.

The doctrine of venue and its various incidents are very fully and elaborately explained, (pp. 340—353.) The practitioner will find the remarks on the meaning of the undertaking on bringing back the venue exceedingly valuable.

On the "particulars of demand" the author has compressed

¹ Bowler v. Brown, 2 Ad. & Ell. 116.

² Wilton v. Chambers, 7 Ad. & Ell. 524. A certificate is not necessary to enable a person to practise in the County Court, though by writ of justices for a sum beyond 40s.; and a person once admitted and enrolled is not disqualified for this purpose, though he has not taken it out for many years; Cross v. Kaye, 6 T. R. 663; Hodgkinson v. Mayer, 6 Ad. & E. 194.

³ Eyre v. Shelley, 6 M. & W. 269.

an immense amount of "useful knowledge" into a small compass. Take, for an example of the latter, the following segment of the section on the nature and effect of bills of particulars.

"The particulars form no part of, nor can they have in any respect, except so far as the rules which will be presently mentioned apply, the effect of a pleading¹. Where in the particulars the plaintiff gives credit for a certain sum as having been paid on account, that is a distinct admission of the fact of such payment; consequently if he fails to prove that more than that sum was due, he answers his own case, and so far as the amount goes, puts himself out of court. But if, in such a case, there was no plea of payment, the defendant was not until lately in condition to have the full benefit of such admission. For there was no issue on the point, and consequently the jury must, on the issue of *non assumpsit*, or *nunquam indebitatus*, have given nominal damages. If however no express admission were made, as if the particulars, showing various items amounting to two hundred pounds, stated that the plaintiff claimed ten pounds to be due in respect of them, or as the balance of the account, without showing by what means the reduction was made, there was nothing upon which the jury could act, and the only effect was that the plaintiff might have recovered for whatever he proved, not exceeding ten pounds.

"The insisting on such an admission as a ground for limiting the damages, is very different from giving substantive evidence of payments, in order to cut down the plaintiff's proof. The latter was evidently a case within the principle of the new rules, which was to prevent either party from being taken so by surprise, and the defendant should have represented his defence, whether it was to go in bar to the whole, or a part of the plaintiff's demand, by a plea on the record."

After citing cases illustrative of the above remarks, he then proceeds:—

"From these cases we may extract the positions: 1st, that a payment expressly admitted on the face of the particular, might, on the general issue, have been set off by the defendant against the plaintiff's proof, but though it covered the whole, it would not have entitled the defendant to a verdict in his favour. 2ndly, that the claim of a smaller sum as a balance, without an express admission of a payment as the means of the reduction, availed the de-

¹ See *Staples v. Holdsworth*, 4 B. N. C. 717. Count for work and labour—particulars contained two distinct items—held payment into court did not admit that something was due in respect of each item. *Booth v. Howard*, 5 D. P. C. 438.

fendant no farther on such plea, than to limit the amount of the verdict against him; and 3rdly, that he could not, upon such a plea, have given any affirmative evidence of payment, even in reduction of damages. These remarks have been considered necessary in order to a proper understanding of the supplemental pleading rules, M. T., 1 Vict.; by which it will be observed the doctrine contained in the first position is altered, and the defendant may now use such admission, not in reduction only, but in bar of the action, as well as if he had pleaded payment. The second position is still law, and the last is confirmed.

“ The rules alluded to are as follows :—

“ *Payments credited in particulars of demand need not be pleaded.*—

In any case in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money.

“ *Rule not to apply to claim of balance.*]—But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums.

“ *Payment in reduction of damages or debt not to be allowed.*—

Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.”

In the chapter on “Payment into Court,” we find another suggestion, which has been since confirmed in *Armfield v. Burger*, 6 M. & W. 281; viz. that in an action on a bill of exchange, bond, &c., where part only of the original amount remains due, and the defendant wishes to pay that into Court, he should address some plea of discharge to the residue, and then, as in all cases where the plea of payment is addressed to the exact sum paid in, the latter averment, viz. of no damages *ultra*, is superfluous and should be omitted.

We cannot venture on further extracts, but enough have been given to justify our warm recommendation of the work.

DIGEST OF CASES.

COMMON LAW.

[Comprising 9 Adolphus & Ellis, Part 4; 10 Adolphus & Ellis, Part 1; 3 Perry & Davison, Part 2; 1 Manning & Granger, Part 1; 6 Meeson & Welsby, Parts 2 & 3; 8 Dowling's Practice Cases, Part 3; and a selection from 9 Carrington & Payne, Part 2;—all cases included in former digests being omitted.]

ABATEMENT.

(*Of action by death.*) After verdict for the plaintiff, and pending a rule for a new trial: Held, that no cause could be shown until there was a personal representative; and that cause could not be shown on behalf of the attorney, who claimed a lien for his costs.—*Shoman v. Allen*, 1 Man. & G. 96, n.

And see PAYMENT OF MONEY INTO COURT, 2.

ACTION ON THE CASE.

(*Award of prospective damages in.*) In an action on the case for an injury done by the defendant's dog to the plaintiff's apprentice, whereby the plaintiff was for a long time deprived of his services, the defendant pleaded payment into Court of 10*l.* The jury found that the plaintiff had not sustained damages to a greater amount than 10*l.* before the commencement of the action, but gave 20*l.* more for prospective damages after action brought. The Court refused to disturb the verdict. (2 Saund. 169; 3 Bing. N. C. 371.)—*Hodson v. Stall-brass*, 3 P. & D. 200; 8 D. P. C. 482.

AFFIDAVIT.

(*Sworn abroad.*) An affidavit, which by the jurat appears to have been sworn in Ireland, before a commissioner of the Irish Court of Queen's Bench, cannot be read in the Court of Queen's Bench in England. (4 D. P. C. 324.)—*Griffin v. Smythe*, 8 D. P. C. 490.

(*Affidavit of merits, by whom to be made.*) An affidavit of merits, sworn by the managing clerk of the defendant's attorney, must state, not only that he is the managing clerk generally, but that he had the management of the particular cause in question.—*Doe d. Fish v. Macdonnell*, 8 D. P. C. 501.

(*Description of party in.*) Where an action had been brought against the defendant by the name of W. Neely, and had proceeded to execution so entitled, it was held that an affidavit, which described the defendant as William Neely,

could not be read in support of an application against the sheriff for not returning the *fi. fa.*—*Reg. v. Sheriff of Surrey, in Smith v. Neely*, 8 D. P. C. 510.

AFFIDAVIT. See **WRIT OF TRIAL**.

AMENDMENT.

(*Under 3 & 4 W. 4, c. 42, s. 23—When to be made.*) An amendment of the *nisi prius* record, under the 3 & 4 Will. 4, c. 42, s. 23, must be made during the trial and before verdict, and the judge cannot give the party power to amend on a future day.

Where the original declaration stated that the plaintiff *became and was tenant* to the defendant of a messuage, on terms contained in articles of agreement between them, whereby the defendant agreed to grant the plaintiff a future lease for 21 years, containing certain covenants; and averred that the plaintiff covenanted to accept such lease, and that, in consideration of the premises, &c., the defendant promised the plaintiff that he should hold and enjoy the premises for the term, without any let, hinderance, &c. from the defendant or any person claiming through him; that the plaintiff remained and continued such tenant as aforesaid until, &c., and paid a quarter's rent; but that the plaintiff broke his promise in this, that one R. had lawful title to the premises under a previous lease, granted by the defendant and others, and ejected the plaintiff, &c.: to which declaration there were pleas of non assumpsit, and that the defendant did not become tenant *modo et formâ*:—Held, that the amendment of the declaration, by such alterations and insertions as were necessary in order to treat the agreement, not as an actual demise, but merely as an agreement for a future lease, and making the breach to consist, not in the plaintiff's not holding or enjoying without eviction, but in the defendant's having no title to grant a lease, was not within the stat. 3 & 4 Will. 4, c. 42, s. 23, inasmuch as it introduced an entirely new contract and new breach.—*Brashier v. Jackson*, 6 M. & W. 549.

2. (*Time for.*) After the trial of an issue on the plea of not guilty, it is not too late to apply to amend the prayer to a replication to a plea of *nul tiel record*.—*George v. Rookes*, 8 D. P. C. 505.

And see **EJECTMENT**, 1.

ARBITRATION.

(*Award, when "made and published."*) Where an order of reference required that the arbitrator should *make and publish* his award in writing, ready to be delivered to the parties, or such of them as should require the same, on or before a certain day: Held, that the award was "published" and "ready to be delivered," within the meaning of the order, when it was executed by the arbitrator in the presence of and attested by witnesses: and that it could not be set aside, although the plaintiff died on the following day, and before he had notice that the award was ready. (3 M. & W. 461; 9 Bing. 605; 5 B. & Adol. 518.)—*Brooke v. Mitchell*, 6 M. & W. 473; 8 D. P. C. 392.

ATTORNEY.

1. (*Privileged communication to, what is.*) Where an attorney sued for work and labour, in issuing an execution against C., and the defence was that he was employed by B. and not by the defendant: Held, that the plaintiff's agent, an attorney, might be asked whether the plaintiff had not said, on introducing B. to him, that he the plaintiff had been employed by B. to issue execution

against C.: and that this was not a privileged communication.—*Gillar v. Bates*, 6 M. & W. 547.

2. (*Uncertificated attorney—Costs—Taxation.*) Where a party has employed an attorney who has not taken out his certificate, without knowledge of that fact, he is entitled, on succeeding in the cause, to recover his costs against the opposite party; if he has made advances to the attorney to an amount sufficient to recover the taxed costs. (3 Bing. 9; 2 D. P. C. 823; 3 Y. & J. 24; 1 Russ. & M. 744, 746.)

If an attorney's bill be reduced on taxation after action brought, but before trial, by less than a sixth, and the defendant afterwards succeeds in the cause on a plea of set-off, the defendant is not entitled to the costs of the taxation as costs in the cause.—*Wilson v. Knapp*, 8 D. P. C. 426.

3. (*Taxation of bill.*) An attorney's bill delivered before action brought by his executor, is not taxable. (1 C. & P. 3; 1 Salt, 89; 2 Stra. 1056; 4 Taunt. 725; 7 D. P. C. 87; 4 D. P. C. 397; 2 Myl. & Cr. 423.)—*Doe d. Sabin v. Sabin*, 8 D. P. C. 468.

And see AFFIDAVIT, 2.

AUTREFOIS ACQUIT.

If a party charged with murder, committed in the perpetration of a burglary, be generally acquitted on that indictment, he cannot afterwards be convicted of the burglary with violence, as the general acquittal on the charge of murder would be an answer to that part of the indictment containing the allegation of violence.—*Reg. v. Gould*, 9 C. & P. 364.

BANKING COMPANY.

(*Execution against members of.*) The proper course of proceeding under the 13th section of the 7 Geo. 4, c. 46, (the Banking Co-partnership Act), which allows executions on judgments obtained in actions against the public officer of the company to be issued against any member or members of the company for the time being, is by *scire facias*, and not by suggestion on the roll.—*Bosanquet v. Ransford*, 3 P. & D. 298; *Cross v. Law*, 6 M. & W. 217.

BANKRUPTCY.

1. (*Order of Court of Review under 6 Geo. 4, c. 16, s. 18.*) Where an order is made by the Court of Review under 6 Geo. 4, c. 16, s. 18, to cause a fiat in bankruptcy to be proceeded with notwithstanding the petitioning creditor's debt has been found insufficient, the petition on which the order is made cannot be used to explain any ambiguity in the order.

Where, therefore, an order recited that G. H., public registered officer of the N. and C. bank, had petitioned the Court that the fiat should be proceeded with, and adjudicated that the debt of J. C., the petitioning creditor, was an insufficient debt, and that the debt of the N. and C. bank proved under the fiat was so incurred not anterior to the debt of the said banking company: Held, that the order was invalid, as it did not state distinctly that the debt of the N. and C. bank had been proved before the petition was made.

A clerical error, however, will not vitiate the order: Held, therefore, that stating the debt of the N. and C. bank to have been incurred not anterior to the debt of the said banking company (instead of J. C.) was immaterial.—*Christie v. Unwin*, 3 P. & D. 204.

2. (*Retrospective operation of stat. 2 & 3 Vict. c. 29.*) An act of bankruptcy having been committed on the 6th of July, a *bond fide* execution was issued on the 8th, under which the goods of the bankrupt were levied. On the 19th of July the 2 & 3 Vict. c. 29, was passed, and on the 24th a fiat in bankruptcy issued, under which the plaintiffs were chosen assignees: Held, that the execution was protected by the statute.—*Edmonds v. Lawley*, 6 M. & W. 283.

And see WITNESS, 1.

BILLS AND NOTES.

1. (*Notice of dishonour.*) The following was held a sufficient notice of dishonour: "D.'s" acceptance for 200*l.*, drawn and indorsed by you, due 30th July, has been presented for payment and returned, and now remains unpaid. (2 M. & W. 799).—*Cook v. French*, 10 Ad. & E. 131, n.
2. (*Promissory note, what is.*) The following instrument is payable on a contingency, and therefore not a promissory note:—
 "Twelve months after date I promise to pay A. and B. 500*l.*, to be held by them as collateral security for any monies now owing to them by J. M. which they may be unable to recover on realizing the securities they now hold, and others which may be placed in their hands by him. (4 M. & W. 169).—*Robins v. May*, 3 P. & D. 147.
3. (*Failure of consideration—Pleading.*) Plea, to an action by drawer against acceptor of a bill of exchange for 20*l.* 8*s.* 6*d.*, that before the drawing and acceptance of the bill, it was agreed between the plaintiff and defendant that the plaintiff should do certain carpenter's work for the defendant for 63*l.*; that the defendant paid the plaintiff 43*l.* in part payment of the 63*l.*, and afterwards accepted the bill of exchange on account of the residue of the 63*l.*; that the plaintiff did not perform his agreement, but neglected to perform some work, and performed in an unworkmanlike manner other work, necessary to be done under the agreement; and that the 43*l.* was more than the whole work done was worth: Held bad, on motion for judgment non obstante veredicto, as disclosing, not a total failure of consideration for the bill, but only a partial failure of the consideration, to which the money payment and the bill were alike applicable.—*Tricksy v. Larne*, 7 M. & W. 278.
4. (*What is a promissory note.*) The following document was held to be a promissory note, and to require a stamp; "August 25, 1837. Memorandum, that I, Benjamin Payne, had 5*l.* 5*s.* for one month of my mother and S., from this date, to be paid by me to her.—Benjamin Payne." (4 B. & C. 235; 7 D. P. C. 598).—*Shrivell v. Payns*, 8 D. P. C. 441.

And see PARTNERSHIP, 1; PLEADING, 2, 5.

BOROUGH.

- (*Civil jurisdiction of borough quarter sessions.*) An appeal lies to borough quarter sessions against an order of borough justices, under 9 Geo. 4, c. 40, s. 48, for paying the expenses of removing a pauper to a lunatic asylum, although the charter, granted to the borough under 5 & 6 Will. 4, c. 76, confers criminal jurisdiction only.—*Reg. v. Inhabitants of St. Lawrence, Ludlow*, 3 P. & D. 155.

CANAL COMPANY.

The judgment in *Parnaby v. Lancaster Canal Company*, 3 N. & P. 543, was affirmed

on error in the Exchequer Chamber.—*Lancaster Canal Company v. Parnaby*, 3 P. & D. 162.

And see *MANDAMUS*, 1 ; *POOR RATE*.

CORONER'S INQUISITION.

A coroner's inquisition stated that the death was occasioned by a locomotive engine of the Stockdale and Darlington Company being driven against him, and that the same did feloniously cast him to the ground : Held bad.

The marks of jurors who are marksmen must be attested. (3 C. & P. 602.)—*Reg. v. Stockdale and Darlington Railway*, 8 D. P. C. 516.

COSTS.

(*By whom payable.*) The Court will not compel a person not a party to the record to pay the plaintiff's costs in ejectment, although it appears that he has induced the defendant, an insolvent person, to defend the action, has employed the attorney, and furnished money for the defence. (10 B. & C. 110, 615 ; 6 D. P. C. 699.)—*Doe d. Wright v. Smith*, 8 D. P. C. 517.

And see *ATTORNEY*, 2, 3.

COURTS OF REQUESTS ACTS.

On an application under the Middlesex County Court Act, 23 Geo. 2, c. 33, s. 19, it is sufficient that the defendant should in his affidavit state himself to be liable to be summoned to the county court ; he need not add, "for the cause of action" in question. (5 B. & C. 532.)—*Heath v. Seagur*, 8 D. P. C. 424.

CRIMINAL INFORMATION.

The Court will not discharge a rule for a criminal information for assault, on the ground that the prosecutor had given the defendant into custody for the assault, intending to proceed against him before a magistrate, he having on the following morning declined to press the charge, and taken no further step till he applied for the criminal information. (4 Ad. & Ell. 576.)—*Reg. v. Gwilt*, 3 P. & D. 176 ; 8 D. P. C. 476.

DAMAGING MINES.

The bottom of a shaft of a mine had water in it, and the owner had caused a scaffold to be erected at some distance above the bottom of the shaft, to work a vein of coal, which was on a level with the scaffold : Held, that this scaffold was an *erection* used in the conducting of the business of the mine within 7 & 8 Geo. 4, c. 30, s. 7, and that the damaging it with intent to destroy or render it useless was felony.

A coal-mine was worked by a steam-engine, which caused a cylinder called a drum to revolve and take up the rope as the coal was drawn up from the mine : Held, that proof of damaging the drum would not support an indictment charging the damaging of a steam-engine used in a mine.—*Reg. v. Whittingham*, 9 C. & P. 234.

DEED.

(*Reservation of wayleave to and from mines, construction of.*) By a deed, dated in 1630, the grantor conveyed in fee-farm land of the manor of A., in the county of Northumberland, "excepting and reserving out of the grant all mines of coals within the fields and territories of A. aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking pit or pits ;" with a covenant by the grantees that they, their

heirs and assigns, "should give such accustomed recompense for digging and breaking the ground within A. aforesaid, in which any pits should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed there in like cases."

By another deed of the same date, the same parties conveyed in fee-farm, to other persons, lands in the manor of H. (adjoining A.) with a like exception, reservation and covenant.

Quere, whether under this reservation of a "sufficient wayleave," the coal-owner had now a right to make a *railway* for the purpose of carrying the coals from the mines for shipment, with cuttings and embankments, and fenced in so as to exclude the owner of the soil.

Held, however, that the right was not confined to such ways as were in use at the time of the grant.

Held, also, that under the reservation of liberty of sinking pits, the right of erecting a steam-engine and other machinery necessary for draining them, with all proper accessaries, passed as incident thereto.

Held, also, that under the reservation in the former deed, the coal-owner could not carry over A. coals got in H., although from part of the same mineral field.

To an action of trespass for breaking the plaintiff's close and laying a railroad thereon, the defendant justified under the reservation in the above deeds. The plaintiff new assigned to the plea, that the trespasses were committed on other and different occasions, and to a greater extent than was necessary, and for other and different purposes, and on other parts of the close; to which there was judgment by default: Held, that, on these pleadings, the plaintiff could not dispute that *some* species of railroad was within the reservation, but that the question was, whether the railroad was constructed in a direction or in a manner unauthorized by the reservation.—*Dand v. Kingscote*, 6 M. & W. 174.

And see RAILWAY SHARES.

DISTRINGAS. See PROCESS, 1.

DOMICILE. See LEGACY DUTY.

EJECTMENT.

1. (*Amendment of declaration*.) The Court will not allow a declaration in ejectment to be amended (no one having appeared) by correcting a mistake in the Christian name of the lessor of the plaintiff.—*Doe d. Street v. Roe*, 8 D. P. C. 444.
2. (*Staying proceedings in second ejectment*.) After verdict for the defendant in ejectment, the Court stayed proceedings in a second ejectment, brought for the same property by the devisee of the former lessor of the plaintiff, until payment of the costs of the first action. (4 Dowl. 250.) And the devisee of the defendant in the former action having been admitted to defend, he was held to be in a situation to make the application, although he had not yet entered into the consent rule.

Under such circumstances, the affidavit should be entitled in the cause, with the casual ejector as the defendant.—*Doe d. Mudd v. Roe*, 8 D. P. C. 444.

3. Where a plaintiff in ejectment has been nonsuited for want of the defendant's appearing to confess lease, entry and ouster, the defendant cannot move to restore the cause to the list; the proper application is to set aside the nonsuit and have a new trial.—*Doe d. Fish v. Macdonnell*, 8 D. P. C. 488.

4. (*Declaration against several tenants—Notice.*) In ejectment against several tenants, on a motion for judgment against the casual ejector, the names of all the tenants should be introduced into the copy of the declaration and notice attached to the affidavit of service.—*Doe d. Ludford v. Roe*, 8 D. P. C. 500.
5. (*Service.*) In ejectment for a chapel and free-school, service on the minister and a trustee of the chapel, and on the master of the school, and the sticking up a copy on the doors, held sufficient. (7 D. P. C. 97, 121.)—*Doe d. Smith v. Roe*, 8 D. P. C. 509.

EVIDENCE.

1. (*Hand-writing.*) Where the hand-writing of A. B. is in issue, a paper purporting to be written by A. B., but not relating to the issue in the cause, cannot be put into the hands of witnesses in order to test their veracity, by asking them whether it is in his hand-writing. (5 Ad. & E. 514.)—*Griffiths v. Ivory*, 3 P. & D. 179.
2. (*Of custom of trade.*) Where a corn-factor in London received a commission to sell oats of a certain quality, free on board, on account of a principal in Ireland, and sold them on the same day in London, in his own name, and sent a sale note to his principal as "sold on account of his principal:" Held, in an action by the corn-factor against the principal to recover damages for the oats not answering the description, and to cover the loss which the corn-factor had sustained by selling in his own name, that evidence of a custom in the corn trade for the corn-factors in London to sell in their own name was inadmissible. (1 N. & P. 677; 1 M. & W. 466; 2 M. & W. 440.) [But see *Trueman v. Loder*, post, p. 416.]
Quære, the form of declaration by the corn-factor against his principal in such a case.—*Johnston v. Usborne*, 3 P. & D. 236.
3. (*Secondary evidence.*) There are no degrees in secondary evidence; therefore a party who has laid the foundation for such evidence may prove the contents of a deed by parol, though it appear that an attested copy is in existence. (6 C. & P. 206.)—*Doe d. Gilbert v. Ross*, 8 C. & P. 389.

And see LIMITATIONS, STATUTE OF; STAMP.

EVIDENCE IN CRIMINAL CASES.

1. (*Subsequent felony—Proof of identity of prisoner.*) To prove the identity of a prisoner named in a certificate of a previous conviction, it is not necessary to call a witness who was present at the trial to which the certificate relates; it is sufficient to prove that the prisoner is the person who underwent the sentence mentioned in the certificate.—*Reg. v. Crofts*, 9 C. & P. 219.
2. (*Deposition before coroner.*) On a trial for murder, the deposition on oath of the prisoner before the coroner, on the inquest held on the body of the deceased, is not receivable in evidence against him. (9 C. & P. 83; 8 C. & P. 250.)—*Reg. v. Owen*, 9 C. & P. 238.
3. (*Cross-examining from depositions.*) Where depositions have been regularly returned by the magistrate to the proper officer, and it is proved by him that they cannot be found without vigilant search, the prisoner's counsel may cross-examine from copies of them, such copies being proved to be correct by the magistrate's clerk.—*Reg. v. Shellard*, 9 C. & P. 277.

EXTENT.

The Court may, under the stat. 25 Geo. 3, c. 35, dispose of the *leasehold* interest of a crown debtor, extended at the suit of the crown.

And the Court, on motion, referred it to the Queen's Remembrancer to report whether the most advisable mode of selling the property was by public or private sale.—*Reg. v. Lane*, 6 M. & W. 489.

FALSE PRETENCES.

(*Indictment.*) An indictment for false pretences charged, in the first count, that the defendant "unlawfully did pretend to J. L. that he the defendant was sent by W. P. for an order to go to J. B. for a pair of shoes," by means of which false pretence he obtained from J. B. a pair of shoes, of the goods and chattels of J. B., with intent to defraud J. L. of the price of the said shoes, to wit, nine shillings, of the monies of J. L. The second count charged, that the defendant falsely pretended to J. L. that W. P. had said that J. L. was to give to him, the defendant, an order to go to J. B. for a pair of shoes, by means of which false pretence he obtained from J. B., in the name of J. L., a pair of shoes of the goods of J. B., with intent to defraud J. L. of the same: Held, that both these counts were bad in arrest of judgment, as neither of them charged a sufficient false pretence under the statute.—*Reg. v. Tully*, 9 C. & P. 227.

FERRY.

(*Declaration for infringement of—Statement of ferry right—Evidence—Reputation.*)

Under a declaration claiming a ferry across a river from A. to B. and back again from B. to A., the plaintiff may recover in respect of a ferry one way only, from A. to B.

And under a lease of a ferry, describing it as from A. to B., and back again from B. to A., a ferry one way only will pass.

A ferry-right is *publici juris*, and therefore evidence of reputation is admissible on a question touching the right; and so also a verdict or decree in equity, in which the right in question was adjudicated on.—*Pim v. Curell*, 6 M. & W. 234.

FOREIGN JUDGMENT.

A judgment of one of the superior Courts of Ireland, or of any other than one of the superior courts of this country, is not conclusive against the defendant, if it appear that he was not duly served with process in the action. (2 B. & Ad. 951.)

To an action, therefore, on an Irish judgment, it is a good plea that the defendant was never served with, nor had notice of, any process in the action.

A replication to such a plea, that the defendant had notice of a writ of summons issuing out of the Court in which the judgment was obtained, for the cause of action upon which such judgment was obtained, is bad on special demurrer, as it does not show that the process, of which notice is alleged, was at the suit of the plaintiff, or was the process in the action in which the judgment was recovered.—*Ferguson v. Mahon*, 3 P. & D. 143.

FORGERY.

(*Forged request.*) A forged paper in the following form,—“Please let the lad have a hat, and I will answer for the money,” is a forged request for the delivery of goods, and is not the less so because it may also be a false undertaking for the payment of money.—*Reg. v. White*, 9 C. & P. 282.

FRAUDS, STATUTE OF.

(*Pleading—Consideration.*) The objection, that there is no note in writing of a promise to pay the debt of another, within 29 Car. 2, c. 3, s. 4, need not be pleaded specially. (5 M. & W. 456.)

A promise to a *debtor* to pay his debt to a third person, is not a promise to answer for the debt of another, within 29 Car. 2, c. 3, s. 4, which applies only to promises made to the person to whom another is answerable. (8 B. & C. 728; 2 East, 325.)

Mere moral consideration will not support an express promise. An express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original cause of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute. Therefore a declaration, charging the defendant on a promise to repay the plaintiff money laid out by him in the maintenance of an infant, who afterwards became the defendant's wife, and in the improvement of her land, and alleging that the defendant, in right of his wife, had received the benefit of all the monies so expended, was held bad in arrest of judgment.—*Eastwood v. Kenyon*, 3 P. & D. 276.

And see PRINCIPAL AND AGENT, 1.

HABEAS CORPUS.

(*Time for return to.*) The Court refused an attachment against the serjeant-at-arms for a contempt, in not making a return to a writ of habeas corpus served on him the preceding day.—*Stockdale v. Hansard*, 8 D. P. C. 474.

And see PRIVILEGES OF PARLIAMENT.

HIGHWAY.

1. (*Liability to repair, under 4 Geo. 4, c. 95, s. 68.*) The 4 Geo. 4, c. 95, s. 68, which recites that doubts have arisen whether any body politic or corporate, or any particular person or persons, liable to repair by tenure or otherwise any old turnpike road, ought to repair any new road set out in lieu of the old road, and then enacts that every body politic or corporate, and person and persons liable to repair any old turnpike road, shall be liable to repair any new road set out in lieu thereof, includes parishes.—*Reg. v. Inhabitants of Barton*, 3 P. & D. 190.

2. (*Costs of indictment for non-repair.*) A prosecutor had obtained a summons under s. 94 of the Highway Act, 5 & 6 Will. 4, c. 50, calling on the parish surveyors to show cause why a highway should not be repaired. The surveyors denied the liability of the parish to repair, and the magistrates, under s. 95, ordered an indictment against the parish, which was preferred, and tried as a traverse on the crown side of the *assizes*, and the defendants were found guilty: Held, that the prosecutor was entitled, as matter of right, to have an order for his costs to be paid out of the highway rate, under s. 95.—*Reg. v. Inhabitants of Yarkhill*, 9 C. & P. 218. But this is not so where the indictment has been removed by certiorari, and the defendants have been acquitted.—*Reg. v. Inhabitants of Chedworth*, 9 C. & P. 285.

And see MANDAMUS, 2.

INDICTMENT.

1. (*Certainty requisite in.*) An indictment charged, in the first count, that the defendant assaulted E. R. an infant above the age of ten and under the age of twelve years, with intent to carnally know and abuse her: and in the second count charged that the defendant unlawfully did, &c. &c., and did thereby then and there unlawfully attempt and endeavour to carnally know and abuse the said E. R.: Held, that the record was bad, for not specifically alleging that E. R. was between the ages of ten and twelve: for that the words "the said E. R." merely meant that she was the same person as described in the first count, but did not import into the second count the description of her as to her age.—*Reg. v. Martin*, 9 C. & P. 215.
2. (*Felony, including assault.*) Where a prisoner is indicted for any felony, including an assault, he may be convicted of the assault, if the indictment contain any one good count, though all the other counts are bad.—*Reg. v. Nicholls*, 9 C. & P. 267. Sentence of hard labour may be passed on all persons so convicted.—*Anon.* 2 Moo. C. C. R. 40.

And see CUTTING and MAIMING; FALSE PRETENCES.

INSURANCE.

(*On expected profits—Insurable interest.*) Messrs. H. & Co., being the owners of two ships, called the *Antelope* and the *Maria*, trading to the coast of Africa, and which were then expected to arrive in Liverpool with cargoes of palm oil, agreed verbally to sell to the plaintiffs 200 tons of oil—100 tons to arrive by the *Antelope*, and 100 tons to arrive by the *Maria*. The *Antelope* did afterwards arrive with 100 tons of oil on board, which were delivered by H. & Co. to the plaintiffs. The *Maria*, having 50 tons of palm oil on board, was lost by perils of the sea. The plaintiffs having insured the oil on board the *Maria*, together with their expected profits thereon: Held, that they had no insurable interest, as the contract they had entered into with H. & Co., being verbal only, was incapable of being enforced.—*Stockdale v. Dunlop*, 6 M. & W. 224.

JOINT STOCK COMPANY.

(*Liability of shareholder in mining company.*) Where a mining company was formed, the capital to be 30,000*l.*, in 3000 shares of 10*l.* each; and 2000 shares only were actually subscribed for, of which the defendant took 100: Held, that letters subsequently written by the defendant to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury to show that he authorized the directors to proceed in the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied for the use of the mines, on the order of the directors.

The members of a mining company have authority by law (in the absence of any proof of a more limited authority), to bind each other by dealings on credit, for the purpose of working the mines, if that appear to be necessary or usual in the management of mines. (7 B. & C. 409; 9 B. & C. 632; 10 B. & C. 128; Moo. & M. 99; 5 M. & W. 2.)—*Tredwen v. Bourne*, 6 M. & W. 461.

And see WITNESS, 2.

JUSTICES. See MANDAMUS.

LANDLORD AND TENANT.

1. (*Rights of tenant to dispute title of landlord—Mortgagor and Mortgagee.*) A

tenant, let into possession by mortgagor before mortgage, subsequently paid his rent to the mortgagee: Held, in ejectment by mortgagee against the tenant, that the latter might defend himself by showing that there had been a prior mortgage, and that he had received notice from the prior mortgagee to pay rent to him, and had paid it accordingly, as the tenant did not thereby deny that the mortgagor, who gave him possession, had title, but simply that the lessor of the plaintiff had a good derivative title.

So also a tenant who has been let into possession by the second mortgagee himself, may show such prior mortgage and notice; for the tenant thereby admits that his lessor, with respect to the first mortgagee, was, in substance, mortgagor in possession not then treated as a trespasser, and so had title to demise, and the tenant is at liberty to go on to show that his lessor has subsequently been treated as a trespasser by the first mortgagee, whereby his (the lessor's) title and the tenant's rightful possession under him have been determined. (1 P. & D. 256; 4 M. & Sel. 347.)

But *quære* whether mortgagee, merely by such notice to the tenant, treats the mortgagor as a trespasser.—*Doe d. Higginbotham v. Barton*, 3 P. & D. 194.

2. (*Holding over.*) Semble, that a joint tenant is not necessarily liable in point of law for the wilful holding over of his co-tenant.—*Hirst v. Horn*, 6 M. & W. 393.
3. (*What is a breach of covenant not to carry manure off farm.*) Where, at the sale of the stock of the defendant, the tenant of a farm, W., the tenant of an adjoining farm, bought two cows, and, by the defendant's permission, left them on the defendant's farm for some weeks, bringing provender from his own farm to feed them: Held, that the manure made by these cows was manure made on the farm, and that the removal of it by W. was a breach of the condition of a bond, whereby the defendant had stipulated with his landlord that he would "put and spread all the manure and compost then collected in the middenstead, or on any other part of the farm, on the meadow land, and would not sell, cart, or convey away any dung, compost, or manure from the said farm."—*Hindle v. Pollitt*, 6 M. & W. 529.

And see *SHERIFF*, 1.

LARCENY.

1. (*By servant.*) If a servant take his master's property, and hand it over to another as a gift, it is as much a felony as if he sell or pledge it.—*Reg. v. White*, 9 C. & P. 344.
2. (*Value of thing stolen.*) Although, to make a thing the subject of an indictment for larceny, it must be, and stated to be, of some value, yet it need not be of the value of some coin known to the law, that is to say, of a farthing at the least.—*Reg. v. Morris*, 9 C. & P. 349.
3. If the owner of goods employ a person, not in his service, to take them to a particular place, show them to a customer, and bring them back, without authorizing him to sell them to or leave them with the customer, and he, instead of taking them to the place appointed, sell them for his own benefit, he will be guilty of larceny, as he had the mere custody and not the possession of the goods.—*Reg. v. Harvey*, 9 C. & P. 353.

LEASE.

- (*Lease or agreement.*) By articles of agreement, dated 2nd May, 1838, the defendant agreed with the plaintiff that he would grant him a lease of a men-

suage, &c., for twenty-one years from Midsummer-day then next, at a rent of 45*l.*, payable quarterly, on the usual days of payment in every year during the said term, the first payment to commence on the 29th September then next: to be entered upon immediately by the plaintiff, he having on the day of the date paid 25*l.* to the defendant: and in the lease were to be contained covenants to pay the rent, to repair, &c. &c., and all other usual and reasonable covenants, with a power to either party to determine the lease at the end of seven or fourteen years: Held, that this instrument amounted to an agreement for a lease only, and not to an actual demise; and that the plaintiff was not entitled to recover as for the breach of an implied promise for quiet enjoyment. *Brashier v. Jackson*, 6 M. & W. 549.

LEGACY DUTY.

(*Law of domicile*.) A British subject, domiciled and having real and personal estate in England, went abroad and purchased, in 1828, the title, castle, and estate of R., in the Papal States. He hired Italian domestic servants, male and female, whom he kept at R. until his death. He expended large sums in repairing and improving the castle and grounds of R., which repairs and improvements were going on at the time of his death. He did not make R. his constant residence, but from 1828 to 1831 sometimes occupied it, sometimes lived in furnished lodgings in the towns adjacent, and at other times visited Rome, Florence, and other parts of Italy, residing in furnished lodgings. In 1831 he came to England, and resided in different parts of it till September, 1832. In March 1832, he sent to R. several cases of plate, books, and wearing apparel. In September 1832, he made his will in London. In the same month he left England and went to Florence, where he remained two months, and thence to R.; he then lived, sometimes in the castle of R., sometimes in furnished lodgings in the adjacent towns, till October, 1833, when he went to Rome, and there lived in furnished lodgings until his death in February 1834: Held, that upon these facts, there was no evidence of the testator's having actually acquired a domicile at R., or elsewhere abroad, although they indicated an *intention* to make R. his domicile: that his English domicile therefore remained, and legacy duty was consequently payable on the bequests contained in his will.

Quære, whether if he had obtained a domicile abroad, legacy duty would not still have been payable.—*Attorney-General v. Dunn*, 6 M. & W. 511.

LIBEL.

On an indictment for libel, the defendant pleaded guilty, and entered into his own recognizance to appear and receive judgment when called upon, and not to be called on at all if he discontinued publishing libels on the prosecutor. The Court refused to pass judgment on him unless the prosecutor produced an affidavit that the defendant had since the trial published libels of him.—*Reg. v. Richardson*, 8 D. P. C. 511.

LIMITATION ACT.

(*Ejectment by remainderman, time for—Acknowledgment of title within 3 & 4 Will. 4, c. 27, s. 14.*) In 1788, estates were settled, by marriage settlement, to the use of the wife for life, with remainders to her issue in tail, with remainder to the settlor (whose heiress at law she was) in fee. In 1818, by deeds to which the husband and wife, and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of

the husband for life, remainder to the wife for life, remainder to R. G., the son, for life, remainder to his issue in tail, remainder to J. F., his sister, for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828: Held, that inasmuch as the estate of J. F. was carved out of the estate tail of R. G., she had the same period for bringing an ejectment in respect of any of the estates comprised in the above deeds, as he would have had if he had continued alive: viz. twenty years from the year 1822, when his remainder came into possession.

Whether a writing amounts to an acknowledgment of title, within the 3 & 4 Will. 4, c. 27, s. 14, is a question for the judge, and not for the jury, to decide.

A party in possession adversely of land, being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows:—"Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent, on an agreement for a term of twenty-one years." The bargain subsequently went off, and no rent was paid or lease executed: Held, that this letter was not an acknowledgment of title, within the 3 & 4 Will. 4, c. 27, s. 14.—*Doe d. Curton v. Edmonds*, 6 M. & W. 295.

LIMITATIONS, STATUTE OF. See **PRINCIPAL AND SURETY.**

LUNATIC. See **PROCESS**, 1.

MALICIOUS PROSECUTION.

(*Probable cause.*) The defendant had indicted the plaintiff for felony, for maliciously obstructing the air-way of a mine, but which it appeared the plaintiff did *bona fide* under a claim of right. In an action by the plaintiff for a malicious prosecution: Held, that it ought to have been left to the jury to say whether the defendant knew that the obstruction had been done under a claim of right, for that, if so, there was no probable cause for the indictment.—*James v. Phelps*, 3 P. & D. 231.

MANDAMUS.

1. Where a canal Company was authorized by an act to purchase lands necessary for the navigation, and were required to enrol the conveyances of such purchased lands with the clerk of the peace, copies whereof were to be good evidence in all courts, the Court, after a lapse of sixty-five years from the time of the purchase of certain lands, during which no application had been made to the Company to enrol the conveyances, refused to grant a mandamus to that effect on the refusal of the Company to do so.—*Reg. v. Leeds and Liverpool Canal Company*, 3 P. & D. 174.
2. (*To justices—Highway Act.*) The Court will not grant a mandamus to justices to compel them to issue their warrant to levy the expenses of cutting a hedge, pursuant to the Highway Act, 5 & 6 Will. 4, c. 50, s. 65, unless it appears that a demand has been made of the expenses from the party sought to be charged, and that the justices were informed of such demand.—*Ex parte Whitmarsh*, 8 D. P. C. 431.
3. (*Same.*) Where magistrates, from a doubt as to their jurisdiction, have declined giving possession of premises to a landlord, pursuant to 11 Geo. 2, c. 19, s. 16, the Court refused to compel them by mandamus to do so.—*Ex parte Fulder*, 8 D. P. C. 535.

MARKET OVERT.

A sale of slippers was made inside of a wholesale shoe warehouse in London, where the transaction could not be seen from the street; the jury found, on the question being left to them, that it was a sale in a shop, and the Court held that the sale was in market overt, and that the shop being inclosed from the street was immaterial. (5 Rep. 83 b.; Cro. Jac. 68.)—*Lyons v. De Pass*, 3 P. & D. 177.

MASTER AND SERVANT.

(*Liability for negligence of driver of job horses.*) The owner of a carriage, who hires from a jobmaster horses and a coachman by the day or drive, is not liable for an injury done by the coachman's negligence: although he pays the coachman a regular sum for each drive, the coachman receiving at the same time weekly wages from the jobmaster: although he provides for the coachman a livery to be worn during the drive: and although the injury was done while the coachman had left the horses to go into the house of the owner of the carriage, in order to take off the livery. (6 B. & C.)—*Quarman v. Burnett*, 6 M. & W.

MUNICIPAL CORPORATION ACTS.

(*Compensation to officer.*) A. was an attorney of the sheriffs' court of the city of York, where a limited number only were admitted, who paid a consideration for their privilege. By the 5 & 6 Will. 4, c. 76, s. 119, that Court was thrown open to all the attorneys of the superior Courts. A. applied under the 60th section for compensation for the loss of his office, and the Treasury made an order for that purpose. The Court made absolute a rule for a mandamus, to compel the corporation to execute a bond to secure payment of the compensation awarded.—*Reg. v. Mayor of York*, 8 D. P. C. 502.

MURDER.

(*By poisoning—Through innocent agent.*) The prisoner had bought a bottle of laudanum, and directed the person who had the care of her infant child to give it a teaspoonful every night. That person did not do so, but put the bottle on the mantelpiece, where another little child found it, and gave part of the contents to the prisoner's child, of which it died: Held, that under these circumstances, the administering of the poison was in law an administering by the prisoner, as if she had herself given it to the child with her own hand.—*Reg. v. Michael*, 9 C. & P. 356.

OUTLAWRY.

(*Right of outlaw to sue.*) Where the plaintiff was an outlaw at the commencement of the action, but the defendant did not know of it until after plea pleaded and notice of trial given, the Court, after verdict, granted a rule to stay the proceedings; which was afterwards discharged, on the reversal of the outlawry granting the rule. (Bac. Abr. Outlawry (D. 3); 2 M. & W. 412.)—*Somers v. Holt*, 8 D. P. C. 506.

PARENT AND CHILD.

(*Liability of parent for debts of child.*) The moral obligation which a father is under to provide for his child imposes on him no liability to pay the debts incurred by the child: and he is not so liable, unless he has given the child authority to incur them, or has contracted to pay them.

The defendant's son, an infant of twenty years of age, had lodged for some time with the plaintiff, during a part of which he had earned wages, and paid for his board, &c. He afterwards fell ill, and was unable to pay for the neces-

saries with which the plaintiff continued to supply him. The plaintiff applied to his father for money, who wrote in answer, that he could not advance any at that time, but his son would come into possession of money in the following month, when he would be twenty-one, and would then be able to pay what he owed the plaintiff himself: Held, that this letter was no admission of a liability in the father. (The Court questioned the decisions in *Blackburn v. Mackey*, 1 C. & P. 1; and *Law v. Wilkin*, B. & Adol.)—*Mortimore v. Wright*, 6 M. & W. 482.

PARTNERSHIP.

1. (*Bill or note made in name of.*) Where a member of a firm called the "Newcastle and Sunderland Wallsend Coal Company" made a note in the name of the "Newcastle Coal Company," and payable at a bank with which they had no account: Held, that it was not to be presumed that the note was made with the authority of the firm, and that it was properly left to the jury to say whether the note was so made or not.—*Faith v. Richmond*, 3 P. & D. 187.
2. (*Effect of covenant of one partner not to sue debtor.*) In action for a partnership debt a covenant not to sue, entered into by one only of the plaintiffs, cannot be set up as a release.—*Walmsley v. Cooper*, 3 P. & D. 149.

PATENT.

In an action for the infringement of a patent for improvements in a cabriolet the defendant pleaded—1, not guilty; 2, that the improvements were not new; 3, that the plaintiffs were not the true and first inventors of the improvements: Held, 1st, that on these pleadings it could not be contended that the patent was illegal as a monopoly; 2d, that though all the improvements claimed must be shown to be new, it need not be shown that the defendant's cabriolet was an imitation of all of them; an imitation of one was sufficient to maintain the action; 3d, that the validity of the patent might be considered to have come in question, so as to entitle the plaintiff to a certificate to that effect under the 5 & 6 Will. 4, c. 83, s. 3.—*Gillett v. Wilby*, 9 C. & P. 334.

PAUPER.

(*Defending in formá pauperis.*) The Court may admit a defendant in misdemeanor to defend in formá pauperis, although the indictment have been removed from the sessions at his instance. (1 W. Bla. 130.)—*Reg. v. Nicholson*, 8 D. P. C. 489.

PAWNBROKER.

Goods were pledged on the 26th of July with the defendant, a pawnbroker, in the name of Mrs. *Warne*, (as he understood,) but in fact by the wife of the plaintiff, *Vaughan*. She subsequently applied to the defendant for and obtained from him a form of declaration under the 39 & 40 Geo. 3, c. 99, s. 15, and 5 & 6 Will. 4, c. 62, s. 12, alleging that she had lost the duplicate. On the 6th August the plaintiff demanded the goods from the defendant, but he refused to deliver them up, on the ground that the declaration had been given. He was then informed that the party pledging was the plaintiff's wife: Held, that the defendant's mere refusal to deliver them up did not constitute a conversion, so as to make him liable in trover to the plaintiff: but that it ought to have been left to the jury to say whether the reasonable time had elapsed for the defendant to be satisfied as to the title to the goods, by the declaration being verified before a justice, pursuant to the 39 & 40 Geo. 3, c. 99, s. 16.—*Vaughan v. Watt*, 8 M. & W. 492.

PAYMENT OF MONEY INTO COURT.

1. (*What it admits.*) In an action for use and occupation, payment of money into Court by the defendant admits the contract, and therefore it is not open to him to contend that the plaintiff is without title, or that another co-plaintiff should have joined in the action, although these facts may appear doubtful on the plaintiff's own evidence.—*Dolly v. Iles*, 3 P. & D. 287.
2. (*To whom paid out.*) Where money is paid into Court by a defendant, who dies before verdict or interlocutory judgment, whereby the suit abates, the money can be paid out only to the present representative of the deceased: an application on the part of his attorney will not be entertained.—*Palmer v. Ruffenstein*, 1 Man. & G. 94.

And see ABATEMENT.

PILOT ACT.

- Case against the owner of a vessel, for an injury done by her in running foul of the plaintiff's barge. Plea, that at the time of the injury, the vessel was being conducted, and was navigating the river Thames, under the conduct of a licensed pilot in charge of the vessel, *under and in pursuance of the provisions of the 6 Geo. 4, c. 125*, and that the damage happened to the plaintiff by the default, incompetency, and incapacity of such pilot. Replication, that before the said time when, &c., the vessel had, on completing a voyage from India, been brought by a licensed pilot into the St. Catherine's Dock, and that having there discharged her cargo, was, just before and at the said time when, &c., being removed, and in the course of removal, for the purpose of going out of that dock to a certain dry dock in the port of London to be repaired, and that the said vessel was not, at the said time when, &c., otherwise navigating or passing upon the said river Thames.

Held, first, that the circumstances stated in the replication brought the case within the exception in the 63d section of the act, and that the owner was not bound to employ a pilot.

Secondly, that the words "wanting a pilot," in the 72d section, are not to be confined to such vessels as are, by the provisions of the act, bound to take a pilot, but are to be construed as applying to any vessel, the master or owner of which thinks fit to require one.

Thirdly, that inasmuch as under the 72d section the pilot could not lawfully refuse to go on board and take charge of any vessel wanting a pilot when required by the owner so to do, he must be considered, when so required and employed, as acting under some of the provisions of the act, and not as the private servant of the owner, and therefore that the owner was protected by the 55th section of the act from his *prima facie* liability in respect of the injury occasioned by the act of the pilot, whilst he was so employed by the owner.—*Lucey v. Ingram*, 6 M. & W. 302.

PLEADING.

1. (*Frivolous plea.*) Debt on bond against A. and B. The defendant A., being under terms to plead issuably, pleaded that the plaintiff ought not further to maintain his action, because the defendants were in partnership as attorneys, and after the commencement of the suit, in consideration that the defendant, at the request of the plaintiffs and of the defendant B., would dissolve the partnership, the plaintiff agreed to forbear all further proceedings in the action, and the partnership was dissolved accordingly; the plaintiff having signed judgment

as for want of a plea, on a motion to set aside the judgment, the Court discharged the rule with costs.—*Blackburn v. Edwards*, 10 Ad. & Ell. 21.

2. (*Bill of Exchange—F frivolous demurrer.*) The Court set aside, as frivolous, a demurrer to a count on a bill of exchange by indorser against acceptor, on the ground that (after stating that J. & C. made the bill) it stated it to be payable to the drawers' order, not then naming them: and they refused to let in the defendant to plead a plea which, as he alleged, showed that the bill was without consideration.—*Knill v. Stockdale*, 6 M. & W. 478.
3. (*Demurrer, form of.*) A special demurrer to two or more counts, which commences by alleging that the declaration is insufficient in law, but assigns separate causes to each count, is a demurrer to the whole declaration.—*Parrett Navigation Company v. Stower*, 8 C. & P. 405.
4. (*Signature of counsel.*) A plea requiring counsel's signature is sufficient, if it has attached to it a copy of the counsel's signature, provided the defendant's plea be signed by the counsel himself.—*Salter v. Ponsford*, 8 D. P. C. 435.
5. (*F frivolous demurrer.*) A demurrer to a declaration on a bill of exchange, for the omission of the word "whereas" at its commencement, held frivolous, notwithstanding the rules of T. T. 1 W. 4.—*Shepherd v. Gosden*, 8 D. P. C. 476.
6. (*Several pleas.*) Where a judge's order has been obtained to plead several pleas, and made a rule of Court, if the plaintiff desires to get rid of those pleas his motion should be to rescind the order. A rule to strike out the plea was discharged, because not drawn up on reading the declaration, or on affidavit that the plea was identical: and the Court refused to allow an amendment. (2 M. & W. 241.)—*South Eastern Railway Company v. Sprott*, 8 D. P. C. 493.
7. (*Duplicity—New Assignment—Consideration.*) Plea to a declaration in debt for 10*l.* as wages; that when plaintiff entered the service of defendant, it was agreed between them that in case plaintiff should at any time during the service get drunk, he should forfeit all wages due to him. Averment, that plaintiff performed the service in the declaration mentioned, and that afterwards and after the said sum of money became due, and whilst the plaintiff was in such service, he became drunk, and forfeited the said wages.
Replication: that after the plaintiff became drunk the defendant discharged the plaintiff from all forfeitures in respect thereof, and then agreed to pay the wages which had already accrued to the plaintiff, and then continued to employ him. New assignment, that only a part, to wit, 3*l.*, parcel &c., accrued due to plaintiff as wages before he became drunk, and that the residue of the monies, to wit, 7*l.*, accrued to the plaintiff for wages as aforesaid after he became drunk, and that plaintiff not only brings his action and has declared for the said monies, parcel, &c., but also for the said monies which had accrued due since &c.
On special demurrer to the replication, on the ground that there was no consideration for the waiver of the forfeiture, and that the replication was double, Held, that the replication was bad on the first point, but that the new assignment was well pleaded.—*Monkman v. Shepherdson*, 3 P. & D. 182.
8. (*General damages—Arrest of judgment.*) Where the evidence at a trial applied generally to a declaration containing a good and a bad count, and the jury gave damages generally also, the Court set aside the judge's order to amend the postea by confining the verdict to the good count, and also awarded a venire de novo, on motion to arrest the judgment. (1 Bos. & P. 329; 2 M. & W. 427).—*Empson v. Griffin*, 3 P. & D. 160.

9. (*Immaterial issue.*) In trespass *quare clausum fregit*, the defendants pleaded that they acted as servants of B., that they delivered up possession of the close to him, and that he afterwards, with the consent of the defendants, made satisfaction to the plaintiff, which was accepted: Held, that, whether or not satisfaction from a stranger could be pleaded, it appeared from the plea in this case that B. was a co-trespasser, so as to be able to make a satisfaction which should enure to the benefit of the defendants; and that, therefore, the averment of their consent to his so making satisfaction was immaterial, and that a replication which tendered issue upon such consent was bad on special demurrer.—*Thurman v. Wilde*, 3 P. & D. 289.

And see *BILLS AND NOTES*, 2; *FERRY*; *RESCOUS*; *SHERIFF*, 2.

POOR RATE.

(*Rateability of Canal Company.*) By a local act (10 Ann. c. 8), a company were authorized to make the river Avon navigable from B. to H., and to make any new cuts through the lands adjoining the river, and commissioners and a compensation jury were authorized to settle and assess what satisfaction the landowners should have for their lands made use of by the company, and to adjust what share of such *purchase-money* every tenant having a particular estate should have, and the order, sentence or decree so made was directed to be made a record of quarter sessions. By a subsequent act, 47 Geo. 3, the company were authorized to make a horse towing path, and further powers were given for the purchase of lands. The company made a new cut under 10 Ann., and a horse towing path under 47 Geo. 3, and under the former statute an inquisition of a jury assessed as a recompense, for the value of the land taken for the act, thirty years' purchase. The company also made a horse towing path. No conveyance was ever made to the company of any land for the cuts or towing path, but previous to making the latter, the company gave a satisfaction to the respective landowners of a general sum or annual payment, as a recompense for the land taken. The remainder of the land taken by the company for a towing path and not used by them, was depastured or otherwise used by the adjoining landowners: Held, that the company had such an exclusive occupation of both the cuts and towing path as made them rateable.

Where a company is authorized to purchase land for the purpose of an act which directs that, in case of difference with the landowners, a compensation jury shall be impanelled, and that the verdict shall be made a record of quarter sessions; if the company take possession after payment of the sum assessed no conveyance is necessary, the record of quarter sessions being available as a title.—*Bruce v. Willis*, 3 P. & D. 220.

POUND BREACH. See *RESCOUS*.

PRACTICE.

1. (*Order nisi at chambers.*) An order nisi before a judge at chambers makes itself absolute unless cause be shown; and if no one appears, the proper course is for the opposite party to go in to the judge and get it discharged, otherwise it becomes absolute.—*Humphreys v. Jones*, 6 M. & W. 418; 8 D. P. C. 408.
2. (*Appeal from judge at chambers.*) Where a judge at chambers, upon the hearing of a summons on affidavit, dismisses a summons upon the merits, the party may renew his application to the Court on additional affidavits.—*Pike v. Davis*, 6 M. & W. 546; 8 D. P. C. 387.

3. (*Notice of countermand.*) A notice of countermand given to a defendant residing in the country, whose cause is conducted by an attorney in London, is insufficient.—*Margetson v. Rush*, 8 D. P. C. 388.
4. (*Entering up judgment.*) The Court refused to set aside a judgment, which, having been pronounced generally in favour of the plaintiff, he had entered up on one count for himself, and on the other for the defendant.—*Harnidge v. Wilson*, 8 D. P. C. 417.
5. (*Staying proceedings during pending of equity suit.*) Where an action had been brought, and a verdict obtained, by the owner of goods against the owner of a vessel on board of which they were damaged, and the latter filed his bill for relief in equity, pursuant to the 53 Geo. 3, c. 159, s. 7, the Court would not, under the 6th section, restrain the plaintiff from proceeding to execution during the pending of the equity suit.—*Thiselden v. Gibbens*, 8 D. P. C. 419.
6. (*Time for pleading, computation of.*) Where a plaintiff obtains an order to amend his declaration, to which the defendant had demurred, and the defendant at the same time obtains an order for time to plead, that time must be calculated from the time of the amendment made, although the latter order do not refer to the former.—*Davies v. Stanley*, 8 D. P. C. 433.
7. (*Giving copies of exhibits.*) Where exhibits had been made in the course of an inquiry before the master, the Court refused, after the conclusion of that inquiry, to compel the party exhibiting to give copies of them to his opponent. (7 D. P. C. 674.)—*Davenport v. Jones*, 8 D. P. C. 497.
8. (*Right to begin.*) In an action on a bill of exchange by indorsee against acceptor, the defendant pleaded pleas denying the acceptance and indorsement and also a plea of payment, on which issues were joined. At the trial the defendant's counsel offered to admit the acceptance and indorsement, and claimed the right to begin: Held, that this admission of all the facts of which the proof was on the plaintiff, did not entitle the defendant to begin.—*Pontifex v. Jolly*, 9 C. & P. 202.
9. (*Same.*) In assumpsit for the wrongful dismissal of a teacher in a school before the expiration of the year for which he was engaged, the only issue was on a plea justifying the dismissal: Held, that the defendant was entitled to begin.—*Harnett v. Johnson*, 9 C. & P. 206.
10. (*Same.*) In trespass for taking the plaintiff's goods, the defendant pleaded first, as to part of the goods, that he took them as a distress for an annuity payable to M. A.; 2dly, as to the residue, that he took them as a distress for rent due to J. A. Replication to the first plea, that the annuity was not in arrear; and as to the second, non tenuit: Held, that on these pleadings the defendant was entitled to begin.—*Aston v. Perkes*, 9 C. & P. 231.
11. (*Same.*) In assumpsit on a warranty of a horse, where the plaintiff in his declaration averred that the horse was not sound, and the defendant pleaded only that it was, on which plea issue was joined, the plaintiff was held entitled to begin.—*Osborn v. Thompson*, 9 C. & P. 339.

PRACTICE IN CRIMINAL CASES.

1. The Court will not entertain a motion to obtain the names of the prosecutors of an indictment for misdemeanor, until after the defendant has pleaded. Nor will it compel the prosecutor to give a list of their names to the defendant previous to his striking a special jury; but will give such directions, by con-

sent of the prosecutors, as shall prevent prejudice accruing to the defendant in consequence of such list not being furnished.—*Reg. v. Nicholson*, 3 D. P. C. 422.

2. (*Postponement of trial.*) Where a true bill has been found for a serious felony, and the trial is postponed on an affidavit leading to a belief that the prosecutor is kept out of the way by the prisoner's procurement; the prisoner will not be admitted to bail in the meantime.—*Reg. v. Guttridge*, 9 C. & P. 229.
3. (*Notice of trial of traverse.*) A. was indicted at the assizes for perjury. He had neither been in custody nor on bail. After the bill was found, A.'s counsel applied to have the case tried at the same assizes: Held, that the prosecutor could not be compelled, not having received notice of trial, to try at these assizes.—*Reg. v. Trenfield*, 9 C. & P. 289.
4. (*Retracting plea of guilty.*) A prisoner who has pleaded guilty to a charge of felony, and on whom sentence has been passed, cannot afterwards be permitted to retract his plea and plead guilty.—*Reg. v. Sell*, 9 C. & P. 346.
5. If additional evidence be discovered in the progress of a criminal case, the counsel for the prosecution is not at liberty to open the nature of such evidence in an additional address to the jury.—*Reg. v. Courvoisier*, 9 C. & P. 362.

PREScription ACT.

(*Interruptions of user—Right of sole pasturage in gross—Evidence.*) To an action of trespass for taking the plaintiff's cattle in an open field called P. and G. field, and impounding them, the defendant pleaded, first, that T. B. and his ancestors had been immemorially used and accustomed to have, for themselves and their heirs and assigns, the sole and several pasturage in two hundred and seventeen acres of P. and G. field in gross for all his and their cattle, from the 4th September to the 5th April: that T. B. in 1755, by indenture, granted the said pasturage to S. B., his heirs and assigns for ever: that J. B. (who claimed by descent from S. B.) in 1836 demised the said pasturage to the defendant, who seized the plaintiff's cattle because they were depasturing on the said two hundred and seventeen acres. The second plea alleged a right of sole pasturage in gross for thirty years before the commencement of the suit, (under the stat. 2 & 3 Will. 4, c. 71, s. 2), in J. B. and his ancestors, and a demise from him to the defendant; concluding as in the first plea. The replication traversed the right of T. B. as alleged in the first plea, and the enjoyment of J. B. as of right without interruption for thirty years as alleged in the second.

It appeared in evidence, that within the last twenty years encroachments had been made by buildings and inclosures on the two hundred and seventeen acres, and that above thirty acres had thus been appropriated, but no encroachments had been made on that part of the two hundred and seventeen acres on which the alleged trespass was committed: Held, that these interruptions being so recent, did not disprove the right of T. B. to the pasturage in 1755, as alleged in the first plea; and that, not having been made on that part of the land where the plaintiff's cattle were depasturing, they were not conclusive evidence of an interruption of the enjoyment of that part by J. B., as alleged in the second plea.

Held also, 1st, that recitals in a deed-poll of the date of 1800, made by an ancestor of the present owner of the pasturage, and relating to the pasturage, were admissible in evidence to prove the marriages, deaths, &c., of the ances-

tors of the owner : 2ndly, that leases and agreements made by the ancestors of the present owner, demising the pasturage in question, were evidence to prove the seisin and user of T. B., the grantor, as showing the enjoyment by parties who claimed under him.

Held also, that the right of pasturage alleged in the pleas was capable of being granted away, and did not necessarily descend to the heir of the grantor.

Quere, whether such a right of pasturage in gross be within the 5th section of the Prescriptive Act, 2 & 3 Will. 4, c. 71.—*Welcome v. Upton*, 6 M. & W. 536.

PRINCIPAL AND AGENT.

1. (*Liability of principal for dealings of agent—Evidence of custom of trade—Statute of Frauds.*) Assumpsit for not delivering tallow sold by the defendant to the plaintiffs. Plea; non assumpsit. Defendant was a merchant in St. Petersburg, and established H. in London, to conduct his business there in the name of H. H. had for some years acted under the general authority of defendant in making sales of tallow in the name of H.; but such sales were understood to be made on behalf of the defendant, whose representative H. was known to be. Shortly before the contract in question defendant became dissatisfied with H., and gave notice to H. that his services would not be required much longer. While the connection was subsisting between them, the contract in question was entered into by means of B. W., a broker acting for both vendor and vendee. The bought-note was, "Bought for T. & C. (the plaintiffs) 1000 casks, &c. B. W., broker." The sold-note—"Sold for H. to my principals 1000 casks, &c. B. W., broker." The defendant at the trial endeavoured to show that H. had made the sale on his own account. The jury found that H. did so intend to make the sale, but that the broker thought that he made it for defendant, in consequence of H. having been so long known as the representative of defendant.

Held, 1, That on this finding the verdict was rightly entered for plaintiffs, on the ground that, until defendant gave notice to the world that he revoked H.'s authority, he was bound by H.'s contracts.

2. That there was evidence of the contract by defendant under the Statute of Frauds.

3. That it was not competent to defendant to give evidence that by the custom of the tallow trade, under such contracts, a party may reject the undisclosed principal, and look to the broker for the completion of the contract.—*Trieman v. Loder*, 3 P. & D. 267.

2. (*Liability of principal for false representation of agent.*) A. applied to C. a house agent, respecting a ready furnished house which C. had to let for B., and asked him "whether there was any objection to the house." C. replied that there was none; whereupon A. took the house by a written agreement, in which however this parol statement was not embodied. In fact there was a brothel next door to the house; B. knew of this fact, but C. did not: Held, in an action by B. against A. for the use and occupation of the house, that the untrue representation made by C. was no defence under a plea that A. had been induced to enter into the contract by fraud, covin, and misrepresentation, (*Lord Abinger, C. B. dissentiente*).—*Cornfoot v. Fawke*, 6 M. & W. 358.

PRINCIPAL AND ACCESSARY.

1. (*Trial of accessory.*) Where principal and accessory before the fact are indicted

- together for felony, and the principal does not appear to take his trial, the accessory is not compellable to plead.—*Reg. v. Ashmall*, 9 C. & P. 236.
2. Three persons were charged with a larceny, and two others as accessories, in separately receiving portions of the stolen goods. The indictment contained also two other counts, one of them charging each of the receivers separately for substantive felony, in separately receiving a portion of the stolen goods. The principals were acquitted: Held, that the receivers might be convicted on the last two counts of the indictment.—*Reg. v. Pulham*, 9 C. & P. 280.
3. (*Accessory after the fact, who is.*) To substantiate the charge of harbouring a felon, it must be shown that the party did some act to assist the felon personally. *Reg. v. Chapple*, 9 C. & P. 355.

PRINCIPAL AND SURETY.

(*Right of action by surety when barred—Evidence.*) By a promissory note, E. H., W. D., and J. H., jointly and severally promised to pay to J. E. 300*l.* with interest. W. D. having afterwards paid J. E. 280*l.* on account of the note, J. E. made the following indorsement upon it:—"Received of W. D. the sum of 280*l.* on account of the within note, the 300*l.* having been originally advanced to E. H." In an action brought by W. D., who had paid the whole amount due, against J. H., to recover contribution from him "as a co-surety:" Held, that the indorsement was admissible in evidence, to prove not only the payment of the 280*l.* but also that the money was originally advanced to E. H. as principal.—(10 East, 109; 15 East, 32.)

The amount of principal and interest was paid by the plaintiff more than six years before the commencement of the suit, with the exception of 30*l.* which was paid by him within that period. The Statute of Limitations having been pleaded: Held, that the plaintiff was entitled to recover only to the extent of 30*l.* which had been paid within the six years, and that the Statute of Limitations was a bar to the rest, as the right of action attached as soon as the plaintiff had paid more than his proportion.

Held, also, in an action on the same note against E. H., the principal, that the Statute of Limitations was a bar to all except 30*l.*, as the plaintiff had a right of action against the principal the moment he paid anything, for so much money paid to his use. (2 Bos. & P. 269; 6 Ves. 805; 14 Ves. 164.)—*Davies v. Humphreys*, 6 M. & W. 153.

PRIVILEGES OF PARLIAMENT.

(*Return of warrant of speaker to habeas corpus, when conclusive.*) To a writ of habeas corpus directed to the serjeant at arms of the House of Commons, commanding him to bring up the bodies of W. E. and J. W., he returned the following warrant:—"Whereas the House of Commons have this day resolved that W. E. and J. W., sheriff of Middlesex, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the serjeant at arms: these are therefore to require you to take into custody the bodies of the said W. E. and J. W., and them safely to keep during the pleasure of this House, for which this shall be your sufficient warrant. C. S. L. Speaker." Held, first, that as the warrant stated the adjudication of the contempt generally, without setting out the particular facts from which the contempt arose, the court had no power to discharge the sheriff, or to enquire into the nature of the contempt.—(14 East, 1; 3 B. & Ald. 420.) Secondly, that the adjudication of the contempt

was sufficiently stated, although by way of recital. Thirdly, that it sufficiently appeared that the contempt was committed against the House of Commons, and that the Speaker had authority to issue his warrant.—*Reg. v. Evans*, 8 D. P. C. 451.

PROCESS.

1. (*Service of distringas on lunatic.*) The keeper of a lunatic having refused to allow the lunatic to be served with a writ of summons, the court granted a rule for a distringas, to be served in the first instance upon the friends of the lunatic, and if they could not be found, upon the keeper. (6 D. P. C. 52.)—*Branson v. Moss*, 6 M. & W. 420; S. C., nom. *Rawson v. Moss*, 8 D. P. C. 412; see also *Jones v. Evans*, 8 D. P. C. 425.
2. (*Indorsement on writ.*) The omission of the words "who resides at," in the indorsement of a copy of a writ of summons served, is immaterial.—*Coppice v. Hunter*, 8 D. P. C. 504.
3. (*Return to re. fa. lo.*) The return to a writ of re. fa. lo. must state positively whether any plaint is pending or not, and the sheriff must not return the proceedings which have taken place before him, leaving it to the court to determine the question whether the plaint is pending or not.—*Wright v. Lewis*, 8 D. P. C. 514.

QUO WARRANTO.

1. (*Affidavit of acceptance of office by defendant, when sufficient.*) A mere statement in an affidavit, for a quo warranto information against a town councillor, that he has accepted the office, is sufficient. The acts constituting acceptance should be also stated.—*Reg. v. Slatter*, 3 P. & D. 263.
2. (*Time for.*) The court will discharge a rule for an information in the nature of a quo warranto, where it appears on showing cause that the information could not be filed within six years of the time when the enjoyment of the franchise commenced.—*Reg. v. Harris*, 3 P. & D. 266; 8 D. P. C. 499.

RAILWAY. See DEED.

RAILWAY ACT.

1. (*Inquisition under, form of—Deviation, power of—Effect of repeal of statute.*) The Bristol and Exeter Railway Act, 6 & 7 Will. 4, c. xxxvi. s. 25, enabled the Company, in case (inter alia) any person whose lands should be required for the purposes of the act, should, for twenty-one days after notice in writing given to him, neglect or refuse to treat, or should not agree with the Company for the sale of his interest, to issue a warrant under their common seal, or under the hands of three at least of the directors, to the sheriff of the county in which the lands should be, commanding him to summon and return a jury, who should inquire of, assess, and give a verdict for the amount of money to be paid for the purchase of such lands, and for compensation for damage thereto: and that the sheriff should accordingly give judgment for such purchase-money, &c., which should be binding and conclusive upon all persons; fourteen days' notice being given of the time and place of the inquiry. A subsequent clause of the act (s. 242) enacted, that the whole of the sum therein mentioned as the probable expenses of making the railway, &c., should be subscribed for before any of the powers given by the act in relation to the compulsory taking of land for the purposes of the railway should be put in force.

An inquisition taken under s. 25, recited that notice had been given to the party

that his lands were required by the Company for the purposes of the act, and that he had not within twenty-one days afterwards agreed with the Company for the sale of them; and also that fourteen days' notice had been given of the time and place of the inquiry before the sheriff: Held, in ejectment by this party against the Company for these lands, subsequently taken by them under the act, that the inquisition was sufficient in form, and that it need not set forth that the whole capital had been subscribed; but that if this were the fact, it should come by way of answer from the plaintiff.—(4 Burr. 264; 7 T.R. 363; 5 Ad. & Ell. 563; 8 Ad. & Ell. 429, 439.)

The 57th section of the act enacted, that the lands to be taken for the line of the railway should not exceed twenty-two yards in breadth, except where a greater breadth should be necessary for waiting places, embankments, cuttings, &c. &c.: and the 59th section provided, that the Company, in making the railway and other works, should not deviate from the line delineated on the plan deposited with the clerk of the peace in pursuance of the act, with or without consent of the owners or occupiers of the lands, more than 100 yards, and that no deviation should extend into the lands or property of any person not mentioned in the book of reference to the plan, unless omitted by mistake: and the Company were empowered to make such deviations in the section as might be necessary in consequence thereof: Held, that this section only prohibited the Company from making the substituted line of the railway itself at a greater distance than 100 yards from the line delineated in the plan; but that it did not prevent them from taking lands at a greater distance from it than the 100 yards, for the purpose of embankments, cuttings, &c.; the intention of the act being to give the Company the same incidental powers with respect to the deviated line, as they had with respect to the original line,

Held, also, that a party whose lands were so taken could not object that the Company had taken, for the same purpose, lands of another person not mentioned in the book of reference.

The 47th section of the act enabled the Company, on payment of such sum as should have been awarded by the jury to the party, or, in case (inter alia) he should refuse or neglect to convey the lands, on payment of it into the Bank of England, in the name and with the privy of the Accountant-General of the Court of Exchequer, to the credit of the party, subject to the order of the Court, to enter upon and take the lands. By the 257th section, the compulsory powers of the act were limited to the period of two years after the passing of the act; which expired on the 19th of May, 1838. By a subsequent act, 1 Vict. c. xxvi. (which received the royal assent 12th June, 1838), s. 1, all the powers and clauses of the former act were to extend to the works, &c. to be done under that act, as if repeated and re-enacted in it. S. 2 repealed s. 47 of the former act. S. 12 revived the time limited by the former act for taking and using lands, and extended and enlarged it for three years from the expiration of the two years mentioned in the former act: and s. 14 enacted, that upon payment of such sums as should have been awarded by the jury into the Bank of England, as in the recited act directed, the Company should have power to re-enter, &c., [re-enacting s. 47 in terms.]

An inquisition was taken under the 6 & 7 Will. 4, within the two years limited by that act. On the 11th of June, 1838, the Company obtained an order of the Court of Exchequer for payment of the purchase-money into the Bank; and on the 21st they paid it in accordingly, the plaintiff not having in the meantime

offered to convey: Held, that these proceedings were warranted by the 1 Vict. c. xxvi. s. 14, and might be founded on the inquisition taken under the former act.—*Doe d. Payne v. Bristol and Exeter Railway Company*, 6 M. & W. 320.

2. (*Turnpike road, within meaning of, what is.*) By a local act, 4 & 5 Will. 4, s. lxi. (the London and Southampton Railway Act), it is enacted that in all cases where the railway shall cross any turnpike road, such turnpike road shall be raised or sunk by and at the expense of the Company, so as the same shall pass over the said railway, or that the said railway shall pass over the said turnpike road: Held, that a road on which toll-gates are by law erected, and tolls taken thereat, is a turnpike road, within the meaning of that act.—*Northam Bridge and Roads Company v. London and Southampton Railway Company*, 6 M. & W. 428.

RAILWAY SHARES.

(*Transfer of—Effect of alteration of conveyance of, after execution.*) The Brighton Railway Act, 1 Vict. c. cxix. s. 155, requires the conveyance of shares to be by writing, duly stamped, and under the hands and seals of both parties. The clause afterwards calls the instrument a "deed or conveyance," and a "deed of sale or transfer:" Held, that this conveyance must, in order to satisfy the statute, be by deed; and therefore that an instrument of transfer of shares, executed by the proprietor of such shares, with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom, on the sale of such shares to the defendant, the defendant's name was inserted as the purchaser, was void.—*Hibblewhite v. M'Morine*, 6 M. & W. 200.

RELEASE.

(*Setting aside plea of.*) The Court will not set aside a plea puis darrein continuance of a release given to the defendants by one of several plaintiffs, unless it clearly appears that there was fraud as between the releasor and releasee. Fraud upon the releasor is no ground for setting aside the plea, since it may be replied.—*Wild v. Williams*, 6 M. & W. 490.

And see PARTNERSHIP, 2.

REPLEVIN. See PROCESS, 3.

RESCOUS.

In case for rescous of goods distrained for toll under the authority of a statute, which gives a right to distrain particular goods only, the declaration must show that the goods taken were such as the plaintiffs had authority to distrain. But a declaration for pound breach of such goods is sufficient, though it disclose no right to distrain. (2 Saund. 128 b; 1 Ld. Raym. 104; Co. Litt. 47 b, n. 9.)—*Parrett Navigation Company v. Stower*, 8 C. & P. 405.

RESERVATION. See DEED.

SEWERS.

An amercement on a township generally, and a distress on one of the parties liable, by commissioners of sewers, for neglect to repair, is good. *Quære*, whether such distress could be sold independently of 3 & 4 Will. 4, c. 22.—*Ramsey v. Norr-
abell*, 3 P. & D. 253.

SHERIFF.

1. (*Action for false return—Pleading.*) The declaration against the sheriff in an

action for a false return, alleged the delivery of a writ of *fi. fa.* at the suit of plaintiff against D., indorsed to levy, &c., by virtue of which writ the sheriff seized D.'s goods of the value of the monies so indorsed and directed to be levied as aforesaid, and then levied the same thereout: Held, that this last allegation meant that the sheriff had sold under the plaintiff's writ, and that he had the proceeds in his hands for the purpose of handing over to the plaintiff. Held also, that, if at the time of executing the plaintiff's writ, the sheriff had in his office a prior writ of *feri facias*, and had paid the proceeds of the execution to the creditor on the prior writ, his plea should have traversed the allegation that he had levied under the plaintiff's writ, and that having set out the above facts specially with a verification, the plea was bad on special demurrer, as being argumentative.—*Drews v. Lainson*, 3 P. & D. 245.

2. (*Liability of to landlord under 8 Anne, c. 14, s. 1—Pleading.*) Case against a sheriff. The first count was framed upon 8 Anne, c. 14, s. 1, for seizing the goods of a tenant in execution, without leaving enough to pay the landlord a year's rent then due, and of which arrear the defendant had notice; and stated that the defendant took the goods of T., the tenant of the plaintiff, under a *fi. fa.* issued against T. at the suit of B. This was not traversed by the pleas, and no other execution appeared: Held, that the connection of the party, who was shown to have seized the goods, with the defendant, sufficiently appeared, without producing any warrant from the defendant to that party. (2 P. & D. 241.)

The second count was in trover for seizing the same goods. The plaintiff put in a bill of sale of them, which had been delivered to him by his tenant before any rent was due. The tenant had remained in possession as before. The jury found the bill of sale fraudulent: Held, that although the bill of sale might still be valid against the plaintiff as a party to it, though void as to other creditors, the plaintiff was not prevented from recovering on the first count, that being distinct from the second.—*Reed v. Thoyts*, 6 M. & W. 410; S. C. nom. *Reid v. Poynts*, 8 D. P. C. 410.

3. It is no answer to a rule calling upon the sheriff to pay over to a plaintiff the proceeds of a levy on the defendant, after judgment by default, and writ of inquiry executed, or to a motion for an attachment against him for the nonpayment, that he has been ordered by the House of Commons to refund the money to the defendants, printers of the House of Commons, and that for disobedience thereto the sheriff is in custody of the serjeant at arms.—*Reg. v. Sheriff of Middlesex*, in *Stockdale v. Hansard*, 8 D. P. C. 522.

SHOOTING.

- (*Intent to murder, how proved.*) On a count charging a shooting with intent to murder, *quare* whether it is essential that the jury should be satisfied that the intent to murder existed in the prisoner's mind, or whether it is sufficient if it would have been a case of murder had death ensued. But if it be essential that the jury should be satisfied of the intent, the circumstance that it would have been murder if death had ensued is a good ground whence the jury may infer the intent, as every man is taken to intend the natural consequences of his acts.—*Reg. v. Jones*, 9 C. & P. 258.

SLANDER.

The plaintiff having been for a few minutes at the defendant's house, a brooch was missed soon after her departure; the defendant immediately went to the postman

to inquire where she lived and meeting her charged her with the theft. They then proceeded to an inn, where the defendant repeated his charge in the presence of two women, who were directed by the defendant to search her; the brooch having been afterwards found in the defendant's own house; in an action for slander, brought by the plaintiff: Held, that it was a question for the jury whether the defendant made the charge *bonâ fide*. (1 C. M. & R. 181.)—*Padmore v. Lawrence*, 3 P. & D. 209.

SMUGGLING ACT.

(*Information on.*) An information alleged the seizure of a certain vessel, being a foreign vessel, for being found within a league of the coast of the United Kingdom, "the said vessel having had on board certain spirits, the said spirits not being in casks or packages containing twenty gallons *each* at the least *respectively*, contrary to the form of the statute in that case made and provided; whereby, and by force of the statutes in that case made and provided, the said vessel, &c. became and was forfeited." By the 3 & 4 Will. 4, c. 53, s. 2, it is provided, that vessels found within a league of the coast of the United Kingdom, having on board any spirits not being in a cask or package containing forty gallons at the least, shall be forfeited. The 6 & 7 Will. 4, c. 60, s. 4, enacts, "that the said restrictions shall not extend to any such spirits in casks of not less than twenty gallons." The 58th section of the 3 & 4 Will. 4, c. 52, renders certain goods subject to restrictions on importation, and amongst them specifies, "spirits, not being perfumed or medicinal spirits:" Held, first, that the information was not bad by reason of the introduction of the words "each" and "respectively," although these words were not in the statute; secondly, that, as the 6 & 7 Will. 4, c. 60, s. 4, repealed sect. 2 of the 4 Will. 4, c. 53, only as related to the number of gallons, the information was not bad for alleging the offence to have been committed against the form of the statute; thirdly, that the information was not bad for alleging the forfeiture to have accrued by force of the statutes, since the words, "whereby, and by force of the statutes," &c., might be rejected as surplusage; fourthly, that, as the information was not framed on the 3 & 4 Will. 4, c. 52, s. 58, it was not necessary to state that the spirits seized were not "perfumed or medicinal spirits." *Attorney-General v. Le Revert*, 6 M. & W. 405.

STAMP.

1. (*On indenture of apprenticeship—Limitation of time for stamping.*) An indenture of apprenticeship, in which no consideration is expressed, is not within the 8 Anne, c. 9, which limits the time of stamping such deeds.—*Smith v. Aggett*, 8 D. P. C. 411.
2. (*Consequences of want of—Parol evidence.*) An agreement signed by the plaintiff only is valid in law as an agreement as against him, and must therefore be stamped. (2 M. & Selw. 286; 2 Bing. N. C. 735.)
Where an agreement cannot be read in evidence for want of a stamp, the plaintiff cannot recover the value of the work and labour to which the agreement refers, although the defendant have had the benefit of it. (3 Esp. 219.)—*Hughes v. Budd*, 8 D. P. C. 478.

And see **BILLS AND NOTES**, 4.

TENDER.

(*By cheque.*) A tender was made by a cheque contained in a letter, requesting a

receipt in return. The plaintiff sent back the cheque, demanding a larger sum, but not objecting to the nature of the tender: Held, a good tender.—*Jones v. Arthur*, 8 D. P. C. 442.

TURNPIKE.

(*Action for calls—Subscription, what amounts to.*) In order to proceed for calls under the General Turnpike Act, 9 Geo. 4, c. 77, against parties who have agreed to subscribe money for the making or repairing a highway, the agreement must be in writing, and must be substantially the same as the form given in the schedule of 3 Geo. 4, c. 126.

Therefore, where at a meeting of the inhabitants of a district, the following instrument was handed about, and was signed by persons then present, to the amount of \$250*l.*:—"At a meeting of, &c. it appearing from the estimates that to make a new line from A. to L. an expense of 4600*l.* will be involved, it was *proposed* that the necessary applications be made without delay, in order to raise funds to meet the expenses, and the gentlemen under-named have *proposed* to subscribe such sums for the purpose as are set opposite to their respective names, and which it is *proposed* to secure by mortgage on the tolls:" Held, that this instrument was a mere proposal, and not an agreement under the 3 Geo. 4, c. 126, and 9 Geo. 4, c. 77, and this, although a local act had been obtained in consequence of the subscription list, and the road had been made. The defendant, who had signed the above proposal, was held not liable for calls made upon it, although he had promised by parol to pay them.

Sect. 82 of 3 Geo. 4, c. 126, is only repealed by 9 Geo. 4, c. 77, ss. 6 & 7, as to so much as relates to the payment and recovery of the sum subscribed for the making of a turnpike road.—*Meigh v. Clinton*, 3 P. & D. 211.

And see RAILWAY ACT.

WAY-LEAVE. See DEED.

WITNESS.

1. (*Competency.*) In an action brought by the assignees of a bankrupt for money had and received to their use, the wife of the bankrupt, who has not obtained his certificate, (but has released his assignees), is not a competent witness to prove the payment of a sum of money to the defendant by the bankrupt after his bankruptcy.—*Williams v. Williams*, 6 M. & W. 170.
2. (*Same.*) A butcher sued three of the directors of a Zoological Society for meat supplied for the animals. For the defendant, a witness was called to prove that the plaintiff was a shareholder in the society. The witness was himself a shareholder: Held, that he was not competent until released by all the defendants; but that a release from the other shareholders was not necessary.—*Betts v. Jones*, 9 C. & P. 199.

WRIT OF TRIAL.

1. When it does not appear by the notes of the under-sheriff that leave has been reserved to move to enter a nonsuit, the Court will not entertain a motion for that purpose.—*Beverley v. Walter*, 8 D. P. C. 418.
2. The affidavit verifying the under-sheriff's notes, on a motion for a new trial, must be entitled in the cause.—*Cohen v. Williams*, 8 D. P. C. 418.

3. Where it is desirable that a cause, which has been tried on a writ of trial, should be tried before a judge of the superior Courts, an application for that purpose will be entertained by the Court on disposing of the rule for a new trial, without making a separate application.—*Duddey v. Yates*, 8 D. P. C. 487.
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RULE OF COURT.

27th May, 1840.

It is resolved by the Judges, that when a Judge's Order is made a Rule of Court, it shall be a part of the Rule of Court that the Costs of making the Order a Rule of Court shall be paid by the Party against whom the Order is made: provided an Affidavit be made and filed, that the Order has been served on the Party or his Attorney, and disobeyed.

[Signed by the Judges.]

EQUITY.

[Containing 9 Sim. Part 3, omitting cases noticed in former Digests.]

ADMINISTRATION OF ASSETS.

(*Supplemental Suit.*) Where an executor died insolvent after a sum had been reported due from him in an administration suit, and a supplemental suit was instituted against his personal representative: Held, that the decree in the latter suit ought to embrace the general administration of the testator's estate.—*Cochrane v. Robinson*, 377.

And see COVENANT.

AGREEMENT.

1. (*Injunction—Specific performance.*) The Court refused an injunction in support of an agreement to sell the exclusive right of printing and publishing certain maps, for which the defendants were to supply drawings, because the Court could not have compelled them in a suit for specific performance to fulfil that part of the agreement. (*Kemble v. Kean*, 6 Sim. 333; *Kimberley v. Jennings*, *ibid.* 340.)—*Baldwin v. Society for Diffusing Useful Knowledge*, 393.
2. (*Specific performance—Variation in proof.*) Where specific performance was sought of an agreement for a lease on the ground of part performance, and the bill stated, as part of the agreement, stipulations as to laying down a field, part of the demised premises, of which stipulations no evidence was given, the Court refused to perform the agreement, although this field had been subsequently severed from the farm upon an abatement of rent to the plaintiff.—*Mundy v. Jolliffe*, 413.

N. B.—The Lord Chancellor has reversed this decision.

ASSIGNMENT OF DEBT.

(*Equity of Assignee.*) In order to give the assignee of a debt the right to proceed in equity against the debtor, the latter must either have refused to allow his name to be used at law, or have done some act to defeat the legal right, and the bill will be demurrable, unless it alleges that the debtor has so refused or acted, or threatens or intends so to do; a charge in the bill, that the debtor pretended there was a release, which the bill denied, or charged to be fraudulent if it existed, was held on demurrer to be insufficient.—*Hammond v. Messenger*, 327.

CONSTRUCTION.

(*Settlement—Policy of Assurance—Bonus.*) A settlement, after reciting an agreement that the husband should insure his life in the names of trustees for the sum of 3000*l.*, which had been done; and further, that he should secure by his bond a further sum, payable at his decease, to be settled, together with

the *said sum* of 3000*l.* under the policy, upon certain trusts, proceeded to declare that the trustees should stand possessed of the policy until the marriage, in trust for the intended husband, and after the marriage, then of *the said sum* of 3000*l.*, when received, and of the other sum to be secured by bond upon certain trusts. The husband died a bankrupt. Held, that a bonus which was given on the policy passed to the trustees of the settlement, the case being decided upon the construction of the settlement, and not upon any notion of a right in the trustees to retain the whole of the proceeds of the policy in satisfaction of the bond which was unpaid.—*Parkes v. Bott*, 388.

CONSTRUCTION OF ORDERS. See PRACTICE, 17.

CONSTRUCTION OF STATUTES. See INSOLVENT; MORTGAGE, 3.

COVENANT.

(*Specialty debt.*) Where there was a covenant by testator "to pay by bills of exchange" a debt created by the instrument in which the covenant was, and the bills accepted by testator in pursuance of such covenant were dishonoured, it was held, in an administration suit, to be a specialty debt—*Copland v. Martin*, 433.

EVIDENCE. See PRACTICE, 10.

FEME COVERT.

(*Exoneration by fine—West Indian estate.*) By a marriage settlement, an estate in Jamaica was limited to trustees for a term, upon trust to raise 18,000*l.*, to be laid out in land in Great Britain of the value of 600*l.* a-year, to be settled when purchased on the husband for life, with remainder to the wife for life, with an option to her to have an annuity of 600*l.* out of the land instead of the land itself; the wife afterwards joined with the husband in mortgaging the Jamaica estate in fee, and acknowledged the mortgage-deed before a magistrate, which by the laws of Jamaica is equivalent to a fine: Held, that the wife had thereby released the estate from her claim to a provision under the settlement.—*Forbes v. Adams*, 462.

And see POWER, 1, 2.

INSOLVENT.

(*Sale by auction.*) The direction in the 20th section of the 7th Geo. 4, c. 57, to sell the insolvent's real estate by auction, is not under all circumstances imperative; and where the assignees, having first failed to obtain a sufficient price by auction, afterwards sold by private contract, it was held good.—*Mather v. Priestman*, 352.

And see MORTGAGE, 2.

JURISDICTION.

1. (*Bishop.*) In a suit for specific performance of an agreement for sale of a next presentation, the Court restrained the bishop both from instituting on the presentation of the defendant, and from collating for lapse during the suit.—*Nicholson v. Knapp*, 326.
2. (*Officers of Court.*) The Court will restrain commissioners for the examination of witnesses from bringing an action for their fees against the solicitor in the cause, and will refer it to the master to ascertain what is due to them.

A stipulation by commissioners, that they should not sit more than four hours, may, under circumstances, be fair and reasonable.—*Blundell v. Gladstone*, 456.

And see AGREEMENT, 1; TITHE COMMUTATION ACT.

MORTGAGE.

1. (*Costs.*) A mortgagee is not entitled, as against the devisees of the mortgage estate, to be paid the costs of an action on the mortgage bond against the executor of mortgagor.—*Lewis v. John*, 366.
2. (*Costs—Foreclosure.*) The assignee of an insolvent mortgagor, who before the bill was filed had consented to join in the conveyance of the estate, and by his answer disclaimed all interest, and who had distributed the whole of the insolvent's estate among his creditors, was ordered to be paid the costs of the suit by the plaintiff.—*Thompson v. Kendall*, 397.
3. (*Heir*, 11 *Geo.* 4 and 1 *Will.* 4, c. 60.) The case of a mortgagee leaving an heir, though such heir be unknown, is not within the above statute, and decidedly not within the statutes 4 and 5 *Will.* 4, c. 23, nor the 1 and 2 *Vict.* c. 69.—*Re Williams, exp. Bird*, 426.

And see FEME COVERT.

PLEADING.

1. (*Demurrer—Extent of admission.*) Where the bill, in order to give the plaintiff a right to sue in equity, charged that the defendant pretended a release (in law), it was held that a demurrer to the whole bill did not amount to an admission of the existence of such release.—*Hammond v. Messenger*, 528.
2. (*Discovery—Production of documents.*) A bill was filed for an account of dealings and transactions between the parties up to the filing of the bill, and also to restrain an action brought by the defendant against the plaintiff upon a previous alleged state of the accounts, certain books and documents referred to in the answer having been brought into court: Held, that the plaintiff was entitled to inspect only such parts of them as referred to the matters in question in the suit, i. e., the state of the accounts at the filing of the bill.—*Rawson v. Samuel*, 442.

And see PRACTICE, 13, 15, 16.

POWER.

1. (*Feme covert—Want of reference.*) A will by feme covert, containing a devise of all the property, real and personal, of which the testatrix was possessed, and of all her reversionary interest in any property or properties, was held by the Court of Exchequer, on a case sent to them by the Vice-Chancellor, to be a good execution of a power given by settlement to the wife to appoint freehold estates in default of issue of the marriage, and subject to the life-interest of the husband.—*Curtis v. Kenrick*, 443. (See *S. C.*, *Mees. & Wels.* 461.)
2. (*Same point.*) There was a similar decision by Lord Hardwicke as to the effect of a residuary devise by married woman, in *Churchill v. Dibdin*, reported in note to the preceding, 447. from Serjeant Hill's manuscript.

PRACTICE.

1. (*Amendment—Further answer.*) Where a plaintiff amends, but does not require a further answer, the order to amend ought to contain a recital to that effect.—*Boddington v. Woodley*, 380.

2. (*Amendment—Injunction.*) Where an injunction had been continued on the merits, a motion for the plaintiff to amend without prejudice is irregular, the proper motion in such a case being simply to amend; and it should be made before the master.—*Woodroffe v. Daniel*, 410.
3. (*Attorney General.*) The Attorney General not having answered within a reasonable time, it was ordered that he should answer within a week after service, or that the bill should be taken *pro confesso* against him.—*Groom v. The Attorney General*, 325.
4. (*Contempt—Waiver.*) An order to amend is no waiver by plaintiff of a contempt in defendant by not answering, as it does not prevent defendant from putting in his answer.—*Livingstone v. Cooke*, 468.
5. (*Costs—Demurrer.*) Where a demurrer to the whole bill is allowed, with leave to amend, the plaintiff has to pay the costs of the demurrer only.—*Hammond v. Messenger*, 327.
6. (*Demurrer—Notice of Motion.*) The pendency of a demurrer does not prevent the plaintiff from giving notice of motion.—*Wardle v. Claxton*, 412.
7. (*Dismissal.*) After a decree or decretal order, not directing inquiries merely, the bill cannot be dismissed.—*Bluck v. Colnaghi*, 411.
8. (*Dismissal—Costs.*) A plaintiff, after being served with a notice of motion to dismiss, filed a replication, and informed the defendant that he had done so, but did not tender the costs of the notice of motion: Held, that the defendant was entitled to make the motion for the purpose of obtaining those costs.—*The Attorney General v. Cooper*, 370.
9. (*Same.*) Where a motion to dismiss is brought on after replication filed, no order can be made except as to the costs, as in the last case.—*Corporation of Dartmouth v. Holdsworth*, 383.
10. (*Examination of Witness.*) If liberty is given to a party to exhibit further interrogatories, he may re-examine a witness whom he has before examined, but not to the same matter.—*Turner v. Trelawney*, 453.
11. (*Injunction.*) A defendant may put in a further answer, pending exceptions to his first answer, although he deprives the plaintiff of the benefit of the common injunction, which he might have obtained on the master's report; the case being distinguished from that of *Russell v. Dight*, 6 Sim. 430, by this, that in the latter case two insufficient answers had already been put in, and that the insufficiency of the third would have entitled the plaintiff to examine the defendant on interrogatories.—*Ingham v. Ingham*, 363.
12. (*Injunction—Demurrer.*) Pending notice of motion for a special injunction, defendant put in a demurrer; it was ordered to be set down, and heard instantane.—*Anon. v. The Bridgewater Canal Company*, 378.
13. (*Revivor.*) Where the defendant dies before appearance, an original bill and not one of revivor must be filed against his representative.—*Crowfoot v. Mander*, 396.
14. (*Service of subpoena.*) The affidavit of service should state the place where the service was made, and it was held insufficient to state that the subpoena was served on A., at whose house the defendant lodged.—*Bichford v. Skewes*, 428.
15. (*Supplemental answer.*) Leave was given to defendant to file a supplemental answer, for the purpose of correcting, upon subsequent information, a mistake

as to the custom of the manor, which, in his first answer, he had admitted, to the best of his belief, to be as stated in the bill.—*Frankland v. Overend*, 365.

16. (*Supplemental answer—Peer.*) Where a bill of revivor and supplement is filed against a *peer*, being the representative of a defendant who died without answering the original bill, he should be served, together with his letter missive, with office copies of both bills.—*Vigers v. Lord Audley*, 408.

17. (*Undertaking to speed—New orders.*) The words, “the second term *then next following*,” in the 17th amended order, refer not to the day on which the undertaking to speed is given, but to the day on which the order for the commission to examine witnesses is served.—*Williams v. Macdonnell*, 490.

And see ADMINISTRATION OF ASSETS.

PROBATE DUTY.

(*East Indies.*) Probate duty is payable only on property actually within the jurisdiction of the Ecclesiastical Courts at the time of the probate being taken out. Accordingly where a testator held securities of the Indian government, which he had agreed before his death to exchange for East India stock; but such conversion did not actually take place till after probate had been granted: Held, that the duty was not payable. (*Attorney General v. Hope*, 4 Tyr. Rep. 878; 8 Bligh, 44.)—*Pearse v. Pearse*, 430.

PRODUCTION OF DOCUMENTS. See PLEADING, 2.

TITHE COMMUTATION ACT.

(*Jurisdiction—Discovery.*) The Court has jurisdiction to grant discovery in aid of proceedings at law, instituted by direction of the tithe commissioners, under the 46th section of the above act.—*Morris v. The Duke of Norfolk*, 472.

TRUSTEE.

1. (*Breach of trust—Acquiescence.*) By a settlement in 1778, made in India, the trustees were directed to invest in securities, at the highest rate of interest that could be obtained, certain funds, of which one moiety was made the subject of another settlement in 1791, upon the marriage of one of the daughters of the parties to the first settlement, the fund still remaining where it had been invested by the original trustees. In a suit that was afterwards instituted by a party interested under the first settlement, a decree was made, by part of which the trustees were directed to transfer to the trustees of 1791 that part of the fund which was the subject of the settlement of that year. This part of the decree was however not complied with, but the fund continued to remain, with the knowledge of the parties interested, in the hands of the parties, to whom it had been lent by the original trustees, till 1830, when these parties, who were the house of Palmer and Co., at Calcutta, failed: Held, that the trustees of the original settlement were liable to those interested under the second; and that the knowledge which the latter had of the investment of the fund did not amount to acquiescence, as the trustees were aware of the embarrassed state of the house of Palmer and Co., but did not inform the parties interested of it.—*Munch v. Cockerell*, 339. (See S. C. reported on demurrer for want of parties, 8 Sim. 219, L. M. No. 42).

N. B. This judgment has been in part reversed by the Lord Chancellor as to the extent of the liability of the trustees, but not so as to affect the result of the decision as stated above.

2. (*Costs—Disclaimer.*) A trustee, who disclaimed by his answer, but was continued as a party till the hearing, was held entitled to his costs only as between party and party.—*Bray v. West*, 429.

And see *MORTGAGE*, 3.

WILL.

1. (*Construction—Annuity.*) Held, that a bequest to two of testatrix's servants, who were man and wife, of "an annuity of 200*l.* each for their joint lives and the life of the survivor," gave to each an annuity of 200*l.* for their joint lives and the life of the survivor.—*Eales v. The Earl of Cardigan*, 384.
2. (*Construction—Cousins.*) Testator by his will gave legacies to several persons by name, describing each of them as his cousin. By a codicil he gave his residuary estate to all such of his cousins both on his father's and mother's side as should be living at his decease, and to all the children of such of his said cousins as might theretofore have died or might die in his lifetime. The testator left several first cousins and children of first and second cousins, and also one first cousin once removed, but all the persons named in the will were first cousins: Held, that they alone, and the children of such of them as had died in testator's lifetime, were entitled to the residue under the codicil.—*Caldecott v. Harrison*, 457.
3. (*Same.*) Testatrix bequeathed her residue to her second cousins of the name of S., and the issue of such of them as were dead (*per stirpes*). She had no second cousins, but had had three first cousins once removed of the name of S., two of whom were living at her death, and the other had died leaving children: Held, that these two, together with the children of the one who was dead, were entitled, to the exclusion of first cousins twice removed, i. e. grandchildren of a first cousin, though standing in the same degree of relationship as second cousins.—*Slade v. Fooks*, 386.
4. (*Construction—Description of residuè.*) The testator, after directing that his property should be realised, and after payment of his debts and funeral expenses should be invested in the 3 per cent. consols., left the annual interest to his executor to be paid to five persons by way of annuities, two of which were given simply in the words "30*l.* to A., 20*l.* to B." In a subsequent part of his will he gave all his household furniture, the whole of his personal property of every kind not specified above, to his wife. Held, that the capital producing the two sums above-mentioned, subject to the life-interest of the annuitants, passed to the wife.—*Clowes v. Clowes*, 403.
5. (*Construction—Forfeiture.*) Testatrix gave legacies to A., B. and C., and declared that if any of them should be dead at his decease, or should not then be heard of to be then living, or should not respectively claim their legacies within twelve months after her death, then the legacies given to such of them as should be dead at her decease, or as should neglect to claim the same within the time aforesaid, should sink into her residuary estate. Three years after the testatrix's death, C. who had not been heard of upwards of twenty years, claimed her legacy. Held, that she was not entitled to it, although she had been ignorant until a short time before that the testatrix was dead.—*Hawkes v. Baldwin*, 355.
6. (*Construction—Maintenance.*) Testatrix gave one-third of his residue to his wife, the other two-thirds to trustees in trust for his two sons, to be paid them at twenty-one, in equal shares, with benefit of survivorship, the income until the shares should be payable, to be paid to the wife, to be applied by her, or in

case of her death, by the trustees, for the maintenance and education of the two sons : Held, that the wife was entitled to the income of the children's shares during their respective minorities, and one son having died, to the income of the whole during the minority of the survivor.—*Hadow v. Hadow*, 438.

7. (*Construction—Reference.*) Testator bequeathed one-sixth part of his residuary estate amongst the children of his late sister J. T., and directed that their share should be paid to them at twenty-one, and that in case any of them should die under that age leaving issue, their shares should be paid to their issue at a certain time, but if any died without leaving issue, their shares to be paid to the surviving children, and the issue of such of them as were dead, *per stirpes*; and he bequeathed another sixth-part to his sister M. C. for life, and after her death unto and amongst her issue, and to be payable at the like time, and with the like benefit of survivorship, and in like manner as before-expressed as to the other sixth-part. M. C. had six children living at testator's death, and had had another, who died before the date of the will, leaving a daughter : Held, that she was not entitled to take either in her own right under the description of issue, which by reference meant the children of M. C., or by substitution for her mother, as she died in the life-time of the testator.—*Peel v. Catlow*, 372.
 8. (*Construction—Vesting.*) Testator bequeathed a sum of stock to his wife and after her decease to his three sons, to be equally divided amongst them, if they should be all living at the decease of his wife, but if any or either of them should die in her life-time, leaving a child or children, such child or children who should be living at the time of the wife's death, should be substituted in the place of such of his sons who should so happen to die, and take his, her, or their parent's share. All the sons died in the wife's lifetime, two of them leaving children who survived the wife, the third died a bachelor : Held, that one-third of the stock fell into the residue.—*Hustler v. Tillbrook*, 368.
 9. (*Construction—Vesting—Mere profits.*) Testator directed his trustees to apply the rents of his freehold estates during the life of his wife for the maintenance and education of his two great nieces, and after his wife's death to sell the estates of which he gave the proceeds equally between both his great nieces, or if there should be but one of them then living, to her only. One of the great nieces died an infant in the lifetime of the widow : Held, that a moiety of the rents from her death to the death of the widow belonged to her, the niece's, representatives.—*Webb v. Kelly*, 469.
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ECCLESIASTICAL.

[Containing cases in 1 Curteis, Part 4. N.B. All the cases not otherwise marked were decided in the Prerogative Court of Canterbury.]

ADULTERY. See SEPARATION.

APPEAL.

(*Competency of.*) It having been held by the Judicial Committee, in the case of Butlin against Barry, that it was not competent for a party to appeal against an interlocutory decision of the Ecclesiastical Court (see Moore, Privy Council Cases, vol. i. p. 98), the Court refused to allow a cause to stand over, for the purpose of allowing a party to appeal against the rejection of a witness.—*Handley v. Edwards*, 722.

BRAWLING.

(*Extenuating circumstances—Costs.*) A party was sentenced to be suspended *ab ingressu ecclesie* for one week, for brawling in the vestry room, but was not condemned in the whole costs, by reason of irritating expressions having been used by the promoter.—*Williams v. Hall*, 497. (Consist.)

CHURCH RATE.

(*Mortgage—Notice.*) A committee having been appointed at a vestry, held the 17th March, "to consider a plan then produced, and to report whether it would be advisable to adopt that or any other plan for affording additional accommodation in the church;" another vestry was subsequently held, upon a notice "to receive the report of the committee appointed, &c.," and at such vestry it was resolved to adopt such plan, and to borrow on the security of the church rate a sum of money to carry it into effect: Held, that the latter part of the resolution was not justified by the terms of the notice.—*Blunt v. Harwood*, 655. (Arches.)

2. (*Pleading.*) In a suit for subtraction of a church rate, made in virtue of the statutes 58 Geo. 3, c. 45, and 59 Geo. 3, c. 131, the libel ought to show upon the face of it that the conditions required by the acts have been complied with. Libel to be reformed.—*S. C.*

COSTS. See WILL, 12.

DOMICILE.

(*Intention to abandon.*) A new domicile can only be acquired by residence, coupled with intention to abandon the old one; and accordingly a Frenchman, who having left France in 1792, resided in England till 1814, after which time he resided occasionally in both countries, and died in England, having made two wills, one intended to operate on his property in France, the other on his

property in England, was held to have been domiciled in France.—*De Bonneval v. De Boneval*, 836.

EVIDENCE.

1. (*Entries in office journal.*) The clerk in a solicitor's office, when speaking of facts within his own knowledge, may refer to the "Office Journal," in order to fix the date of those facts.—*Butlin v. Barry*, 617.
2. (*Pleading.*) Upon an allegation, pleading only instructions by the testator, and execution in the presence of the subscribing witnesses, the evidence of a clerk who drew the will, though he knew nothing directly of the instructions, nor of the execution, was held generally admissible.—*S. C.*

And see SEPARATION.

FOREIGN JUDGMENT.

(*Evidence.*) In all cases where the decisions of foreign courts are relied on, an exemplification of the judgment is required, and a certificate of sequestration (itself not sufficiently proved) was held not sufficient evidence of a decree of a foreign court, declaring the nullity of a will proved in this country, in pursuance of which decree the sequestration purported to have been issued.—*Koster v. Sapte*, 691.

FOREIGN LAWS.

(*Effect of.*) The effect of foreign laws upon rights of persons domiciled in this country, seems liable to be modified by circumstances. And the courts shewed very little disposition to recognize, as affecting personal property in England, a state of the law in Italy arising from the Berlin and Milan decrees of Buonaparte, by which it was alleged that persons resident in this country were made incapable of succession. The case however was decided upon the ground of laches and acquiescence in the foreign claimant, and the want of proper evidence of the foreign law.—*Koster v. Sapte*, 691.

FOREIGNER.

(*Foreign guardian.*) Where the children of a Frenchman deceased were minors, resident in France, administration for their use and benefit was granted to the guardians appointed by the French authorities.—*In the goods of Sartoris*, 910.

HUSBAND AND WIFE. See PRESUMPTION.

JEW.

(*Lunatic Jew.*) Where the next of kin of deceased was a lunatic jewess, administration was granted to the secretary of the Great Synagogue for her use and benefit, her next of kin having been first cited.—*In the goods of Joseph*, 907.

MARRIAGE.

1. (4 *Geo. 4*, c. 76, s. 22.) The undue publication of banns, as where one of the parties disguises his or her name, for the purpose of misleading the public, does not avoid a marriage, unless both parties were privy to the fraud.—*Wright v. Elgood*, 662. (Arch.)
2. (*Same.*) A similar decision was made in the case of an invalid license, the invalidity, which consisted in the fact of it being granted by the bishop of a different diocese from the right one, not being known to both parties.—*Dormer v. Williams*, 870. (Consist.)
3. (*Proof of marriage abroad.*) A collated copy of a register of Barbadoes, where

British laws prevail, is admissible as evidence of a marriage, but an extract from the register, purporting to be signed by the present incumbent, whose signature was attested by a notarial certificate, was held not admissible.—*Coode v. Coode*, 755. (Consist.)

4. (*Publication of banns*.) Publication of banns, made in the lifetime of the first husband or the wife, such husband being dead before the solemnization of the marriage, held good.—*Wright v. Elgood*, 603. (Arches.)

PRACTICE.

1. (*Proof of intestacy*.) Where the signature of testator purported to be attested by two witnesses, but the attestation clause was not full, the Court refused to decree the deceased to be dead intestate, upon affidavits that the will was not duly executed.—*In the goods of Aylins*, 913.
2. (*Proof of Scotch law*.) Administration of the effects of a party deceased, domiciled in Scotland, granted according to the law of Scotland, on proof by affidavit from a Scotch solicitor of what the provisions of that law were.—*Stewart, deceased*, 904.

PRESUMPTION.

- (*Priority of death*.) Where husband and wife are drowned together by the same accident, the presumption is, in the absence of other evidence, that they both died at the same time; and the next of kin of each are entitled to the property of each, as if they had died single.—*Satterthwaite v. Powell*, 705.

SEPARATION.

- (*Adultery—Proof of*.) Separation decreed at suit of wife by reason of adultery of husband, the proof being the communication to her of the venereal disease. Mode of treating such evidence.—*Collett v. Collett*, 678. (Consist.)

N.B. The decision was affirmed by the Arches, but has since been reversed by the Privy Council.

SOLICITOR. See WILL, 12.

TOMBSTONE.

- (*Illegal inscription—Prayers for the dead*.) In a criminal proceeding for erecting a tombstone with an inscription, calling on the reader "to pray for the soul" of the person who was buried; it was held that prayers for the dead are not prohibited by the articles of the Church of England, as they do not necessarily infer a belief in the doctrine of purgatory, having been in use by the Church before that doctrine was known, though from their natural connection with that doctrine they have been discouraged by the Church of England.—*Brecks v. Woolfrey*, 880. (Arches.)

WILL.

1. (*Attestation*.) Probate of a codicil refused because not attested in the presence of the testator, though signed in the presence of the witnesses.—*In the goods of Newman*, 915.
2. (*Attesting witness*.) An attesting witness may also sign the will for the testator, by his direction.—*In the goods of Bailey*, 914.
3. (*Execution—Acknowledgement of signature*.) The acknowledgment of the signature in the presence of two witnesses is sufficient, under the 1 Vict. c. 26, even though the will should not have been actually signed by the testator, but only by his direction, for him.—*In the goods of Regan*, 908.

4. (*Execution—Signature.*) A will must be signed at the end, and probate was refused of a will written on two sides of a sheet of paper, and signed and attested at the bottom of the first side.—*In the goods of Milward*, 912.
5. (*Knowledge of testator.*) A will of an aged testator, prepared by a solicitor, from instructions given by an executor and legatee, and not read over to the testator at the time of execution, nor signed by him in the presence of the attesting witnesses, but only acknowledged in their presence to be his will; the circumstances upon the whole not being suspicious, admitted to proof in the absence of an opposing plea.—*Goose v. Brown*, 707.
6. (*Knowledge and capacity of testator.*) A will and five codicils being propounded, the will and four codicils were established, but the last codicil, which was drawn up by a solicitor in his own favour, was rejected, the testator being of fluctuating capacity, and the proof that he knew the contents of the instrument being insufficient.—*Croft v. Day*, 784.
7. (*Misdescription.*) The executor and sole legatee being by mistake described by his wrong surname, the christian name being rightly given, probate was granted to him in his proper name, with consent of parties interested.—*In the goods of Shuttleworth*, 911.
8. (*Revocation—Delirium.*) A partial tearing of a will by a testator, while in a state of delirium, held not to be a revocation; and probate of such will was granted on motion.—*In the goods of Shaw*, 905.
9. (*Revocation by excision*, 1 Vict. c. 26.) The statute 1 Vict. applies to all wills made before the 1st January, 1838, as regards the revocation of such wills, or any alteration to be made in them, and the excision of the name of testator was held to amount to a revocation, under the words "tearing, or otherwise destroying," of the 10th sect. of that act.
Seem also, that the excision of the names of the attesting witnesses would have the like effect.—*Hobbs v. Knight*, 768.
10. (*Revocation, whether conditional.*) A testator having made a new will since the statute, but without two witnesses, cut out his signature from the previous will: Held, that this was an absolute and not a conditional revocation dependent on the validity of the second will, as it appeared the testator knew that such will was incomplete without two witnesses.—S. C.
11. (*Same.*) A testator having, since the 1st January, 1838, erased the words "three" or "five," whichever it was, and substituted the word "one," the alteration being attested according to the 1 Vict. c. 26, probate of the will was granted, with this part in blank.
Quere if the original word could have been read.—*In the goods of Livock*, 906.
12. (*Solicitor—Legacy to.*) Where a legacy is given the party employed to draw the will, it may raise a presumption more or less strong, according to circumstances, against the validity of the will; but there is no such rule as that it is necessary in every such case to prove that the will was actually read over to the testator, or prepared from instructions given by him.—*Barry v. Butlin*, 637. (Privy Council.)
13. (*Suspicious circumstances—Costs.*) The only son of a testator, who succeeded, on the death of his father, to a considerable landed estate, was condemned in costs for contesting, in a litigious and vexatious manner, the validity

of a will, by which his father, who was a weak old man, bequeathed the whole of his personal estate, about £12,000, to persons in no way related to him, including his solicitor, medical man, and butler.—S. C.

And see PRACTICE, 1.

WITNESS.

(*Competency—Liability for costs.*) A person employed by one of the parties as solicitor, who retained the proctor in the suit, and thereby became legally liable to him for the costs, held to be incompetent as a witness for the parties employing him.—*Handley v. Edwards*, 722. (Prerog.)

HOUSE OF LORDS.

[Containing cases in 5 Clark & Fennelly, Part II.]

APPEAL.

(*Decree—When issue waived.*) When on motion for a new trial of an issue, the parties, to avoid expense and delay, consented to take a decree from the Lord Chancellor upon the evidence taken on the former trials: Held, that such decree was subject to appeal.—*Morris v. Davis*, 163.

EVIDENCE.

(*Proceedings in former suit.*) When a suit had been previously instituted between parties holding the same right as the parties to the present suit, and involving the same question, but not relating to the same land, as the present suit: Held, that proceedings and depositions on the former suit were nevertheless admissible as evidence.—*Viscount Lorton v. Earl of Kingston*, 269.

And see *PEERAGE*, 2.

INTEREST ON JUDGMENT.

Where the judgment of the Exchequer Chamber on writ of error affirming the decision of the Court below, is affirmed by the House of Lords, interest will be given by the House on the sum stated in the judgment, from the day of its affirmance by the Exchequer Chamber; pursuant to the statute, 3 & 4 W. 4, c. 42, s. 30.—*Garland v. Carlisle*, 354.

ISSUE.

(*New trial—Misconception of jury.*) It is no sufficient ground of itself for the new trial of an issue, that the jury should appear to have misconceived the way in which certain evidence was left for their consideration, as that they should have treated certain depositions as direct evidence of the fact to which they related, instead of receiving them as they ought to have done, as a proof of the notice that certain parties had of the question at issue, and important only with reference to the conduct of those parties.—*Viscount Lorton v. Earl of Kingston*, 269.

LEGITIMACY.

(*Adulterine bastardy.*) Where husband and wife were separated, but they resided only at the distance of sixteen miles apart, but occasionally met, the wife being at the time living in adultery. A child, of which the birth was concealed from the husband, and denied by the wife to him, of whose existence the husband never took notice, but which was brought up partly at the expense of the paramour, and generally treated as his child, was held to be illegitimate.—*Morris v. Davis*, 163.

PEERAGE.

1. (*Practice—Form of petition.*) In a claim of peerage, it is not sufficient that the petition to the crown should state that the claimant is of right entitled to the dignity, but it must also pray that he may be declared so entitled; and the defect cannot be supplied by the House, but there must be a new petition to the crown.

It makes no difference in such a case, that the claimant is already a peer by another title.—*Huntly Peerage*, 349.

2. (*Secondary evidence.*) Upon a claim to a Scotch peerage, where no patent of creation could be found; but it appeared from the records of parliament, that the ancestor, through whom the claim was made, had sat in parliament by the title alleged to have been vested in him, an original instrument, purporting to be a grant under the great seal of the dignity in question, which was extracted from the repositories of the family, was admitted in evidence.—*Huntly Peerage*, 349.

PRACTICE.—See **APPEAL**; **PEERAGE**, 1.

WILL.

- (*Issue—Heir and devisee.*) Where the point at issue was the validity of the will of A., and the party claiming under it was, at the time of the institution of the suit, the heir at law of the testator, while the party opposing it was devisee of the immediate heir of A.: Held, that the former party claiming as a devisee could not insist upon the privilege of an heir to have an issue as a matter of course.—*Viscount Lorton v. Earl of Kingston*, 269.

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ABSTRACT OF THE PUBLIC GENERAL STATUTES.

(3 & 4 VICTORIA—*continued.*)

CAP. 27. An Act to continue to the First Day of August, One Thousand Eight Hundred and Forty-three, and from thence to the End of the then next Session of Parliament, Two Acts relating to the Removal of Poor Persons born in Scotland and Ireland, and chargeable to Parishes in England. [3rd July, 1840.]

The acts 3 & 4 Will. 4, c. 40, and 7 Will. 4 and 1 Vict. c. 10, continued to the 1st August, 1843, and from thence to the end of the then next session of parliament.

CAP. 28. An Act to explain and amend an Act of the Second and Third Years of Her present Majesty, for more equally assessing and levying Watch Rates in certain Boroughs. [23rd July, 1840.]

S. 1. The 2 & 3 Vict. c. 28, not to apply to any borough in which the borough fund is sufficient, with the aid of the amount only of watch rate which could be raised under the provisions of the 5 & 6 Will. 4, c. 76, and without the aid of any borough rate, to defray the expense of the constabulary force, and other expenses payable out of the borough fund. Proviso saving all rights to common lands, &c. &c. reserved to burgesses by the latter act.

S. 2. The amount of watch rate to be levied by the council of any borough, under the 2 & 3 Vict. c. 28, to be at the discretion of the council, but not exceeding in any one year 6d. in the pound.

CAP. 29. An Act to extend the Practice of Vaccination. [23rd July, 1840.]

CAP. 30. An Act for the more equal Assessment of Police Rates in Manchester, Birmingham, and Bolton, and to make better Provision for the Police in Birmingham, for One Year, and to the End of the then next Session of Parliament. [23rd July, 1840.]

CAP. 31. An Act to extend the Powers and Provisions of the several Acts relating to the Inclosure of Open and Arable Fields in England and Wales.

[23rd July, 1840.]

S. 1. The award of commissioners under the 41 Geo. 3, c. 109, and 6 & 7 Will. 4, c. 115, or either of them, to be conclusive evidence (subject to the right of appeal given by the 6 & 7 Will. 4) that the provisions of those acts have been complied with, and the necessary consents given. Proviso, that parties taking possession of, or proceeding to inclose or cultivate their allotments, shall be deemed to have waived all right of appeal.

S. 2. Power of the commissioners as to setting out boundaries of parishes, &c. extended to straightening boundaries where the lands are intermixed.

S. 3. Commissioners to declare by their award the parish to which any land cut off in straightening boundaries shall be annexed.

S. 4. Powers of 6 & 7 Will. 4, c. 115, extended to lands commonable only during part of the year.

S. 5. This act to be construed as one act with the 6 & 7 Will. 4, c. 115.

S. 6. Act may be amended or repealed this session.

CAP. 32. An Act to continue for one Year, and from thence until the End of the then next Session of Parliament, the several Acts relating to the Importation and Keeping of Arms and Gunpowder in Ireland. [23rd July, 1840.]

CAP. 3. An Act to make certain Provisions and Regulations in respect to the Exercise, within England and Ireland, of their Office by the Bishops and Clergy of

the Protestant Episcopal Church in Scotland ; and also to extend such Provisions and Regulations to the Bishops and Clergy of the Protestant Episcopal Church in the United States of America ; and also to make further Regulations in respect to Bishops and Clergy other than those of the United Church of England and Ireland.

[23rd July, 1840.]

CAP. 34. An Act for making Provision as to the Office of Master in Chancery in certain Cases.

[23rd July, 1840.]

S. 1. Enables the Lord Chancellor, &c., by order on petition, to direct an annuity not exceeding 1500*l.* to be paid out of the suitors' fund, for the use of any master in chancery who shall be afflicted with any permanent infirmity disabling him from the due execution of his office, and also rendering him incompetent to resign ; and the office to be deemed vacant from the date of the order.

S. 2. No order to be made except upon the production of certificates signed by three physicians or surgeons.

CAP. 35. An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada.

[23rd July, 1840.]

CAP. 36. An Act for preventing Ships clearing out from a British North American Port loading any Part of their Cargo of Timber upon Deck.

[23rd July, 1840.]

CAP. 37. An Act to consolidate and amend the Laws for punishing Mutiny and Desertion of Officers and Soldiers in the Service of the East India Company, and for providing for the Observance of Discipline in the Indian Navy, and to amend the Laws for regulating the Payment of Regimental Debts, and the Distribution of the Effects of Officers and Soldiers dying in Service.

[4th August, 1840.]

CAP. 38. An Act to continue Compositions for Assessed Taxes until the Fifth Day of April, One Thousand Eight Hundred and Forty-two.

[4th August, 1840.]

CAP. 39. An Act to authorize Trustees or Commissioners of Turnpike Roads to appoint Meetings for executing their Trusts in certain Cases.

[4th August, 1840.]

S. 1. Repeals 3 Geo. 4, c. 126, s. 70.

S. 2 provides for notices to be given by the major part of the trustees or commissioners present at any meeting, or their clerk, or any five of the commissioners, in case of a sufficient number not attending on the day appointed by the act or by adjournment, or for want of a proper adjournment.

S. 3. Act may be amended or repealed this session.

CAP. 40. An Act to amend Two Acts of His late Majesty King William the Fourth, for the Relief of certain of Her Majesty's Colonies and Plantations in the West Indies.

[4th August, 1840.]

CAP. 41. An Act to authorize the Commissioners of Her Majesty's Treasury to grant a Lease of the Caledonian Canal for a Term of Years, and to regulate the future Management thereof.

[4th August, 1840.]

CAP. 42. An Act to continue the Poor Law Commission until the Thirty-first Day of December, One Thousand Eight Hundred and Forty-one.

[4th August, 1840.]

CAP. 43. An Act for repairing Blenheim Palace.

[4th August, 1840.]

CAP. 44. An Act to amend an Act of the Seventh Year of King George the Fourth, for consolidating and amending the Laws relating to Prisons in Ireland.

[4th August, 1840.]

CAP. 45. An Act to continue until the First Day of June, One Thousand Eight Hundred and Forty-two, or if Parliament shall then be sitting, until the End of the then Session of Parliament, the Local Turnpike Acts for Great Britain, which expire with this or the ensuing Session of Parliament.

[4th August, 1840.]

CAP. 46. An Act to continue for One Year from the passing of this Act, and thenceforth until the End of the then next Session of Parliament, the several Acts for regulating the Turnpike Roads in Ireland. [4th August, 1840.]

CAP. 47. An Act to repeal so much of an Act of the Ninth Year of the Reign of Her late Majesty Queen Anne, as prevents the Re-election of Mayors of Parliamentary Boroughs and other annual Returning Officers. [4th August, 1840.]

S. 1. Repeal of 9 Anne, c. 20, s. 8.

S. 2. No returning officers re-elected before the passing of this act to be incapacitated, or have his election questioned, under the repealed act.

CAP. 48. An Act to enable Proprietors of Entailed Estates in Scotland to feu or lease on long Leases, Portions of the same for the building of Churches and Schools, and for Dwelling houses and Gardens for the Ministers and Masters thereof. [4th August, 1840.]

CAP. 49. An Act to consolidate and amend the Laws for collecting the Duties of Excise on Soap made in Great Britain. [4th August, 1840.]

CAP. 50. An Act to provide for keeping the Peace on Canals and Navigable Rivers. [4th August, 1840.]

S. 1. Constables to be appointed by two justices, or the watch committee of a borough, for canals and rivers, with powers therein mentioned.

S. 2. Power of dismissal of constables.

S. 3 provides for their payment.

S. 4. Constables guilty of neglect of duty to be liable to a penalty not exceeding 10*l.*, or imprisonment for not more than a month.

S. 5. Constables dismissed to deliver up accoutrements.

S. 6. Persons assaulting the constables in the execution of their duty, liable to a penalty not exceeding 10*l.*, or imprisonment of not more than two months.

S. 7. Penalty on persons on canals and rivers, &c. having in their possession instruments for unlawfully secreting or carrying away liquors or goods.

S. 8. Penalty for unlawfully opening or injuring packages or their contents.

S. 9. Constables having just cause to suspect felony, may enter on board vessels and apprehend suspected persons.

S. 10. Powers of constables to apprehend without warrant in certain cases.

S. 11. Power to constables and persons aggrieved to apprehend and detain offenders till they can be delivered into the custody of a constable.

S. 12. Stolen property offered in pawn may be detained.

S. 13. This act not to repeal local acts containing higher penalties.

Ss. 14—19. Mode of conviction, recovery and application of penalties, limitation of actions, appeal, &c.

S. 20. The powers hereby vested in navigation companies to be exercised by the directors, &c.

S. 21. Act may be amended or repealed this session.

CAP. 51. An Act to amend and explain the General Turnpike Acts, so far as relates to the Toll payable on Carriages and Horses laden with Lime for the Improvement of Land. [4th August, 1840.]

Nothing in the stat. 3 Geo. 4, c. 126, shall enable collectors under any local acts to take toll for horses or carriages employed in carrying lime on any turnpike road for the improvement of land, when exempted by any local acts now in force, or in force at the time of the passing of the 3 Geo. 4, c. 126, but since repealed.

CAP. 52. An Act to provide for the Administration of the Government in case the Crown should descend to any Issue of Her Majesty, whilst such Issue shall be

under the Age of Eighteen Years, and for the Care and Guardianship of such Issue. [4th August, 1840.]

CAP. 53. An Act for vacating any Presentment for rebuilding the Gaol of Newgate in Dublin, and vacating any Contract between the Commissioners for rebuilding the said Gaol and the Contractor. [4th August, 1840.]

CAP. 54. An Act for making further Provision for the Confinement and Maintenance of Insane Prisoners. [4th August, 1840.]

S. 1. On prisoners under sentence or charge of any offence becoming insane, two justices may inquire, with the aid of two physicians or surgeons, as to such insanity; and if the prisoner be certified to be insane, the secretary of state to grant his warrant for his removal to a lunatic asylum: on certificate of two physicians or surgeons of his sanity, the secretary of state to issue his warrant for his removal back to prison, or his discharge.

S. 2. Justices to inquire into the settlement of such prisoner, and make order on the parish for his maintenance, &c.: when the settlement is not found, the order to be made on the treasurer of the county; and if the party is possessed of property, it shall be applied towards the expense.

S. 3. Persons charged with *misdemeanors*, and acquitted on the ground of insanity, may be dealt with and kept in custody in the same manner as persons charged with felony under the 39 & 40 Geo. 3, c. 94; and in such cases the justices are to have the like power of inquiry into the settlement, and ordering maintenance as hereinbefore mentioned.

S. 4. Power of appeal to persons aggrieved by any order of justices.

S. 5. Power of appeal to overseers or guardians.

S. 6. Repeals 9 Geo. 4, c. 50, s. 55.

S. 7. Repeals part of 9 Geo. 4, c. 50, s. 54.

S. 8. Interpretation clause.

S. 9. Act to extend only to England and Wales.

S. 10. Act may be amended or repealed this session.

CAP. 55. An Act to enable the Owners of settled Estates to defray the Expense of Draining the same by Mortgage. [4th August, 1840.]

CAP. 56. An Act further to regulate the Trade of Ships built and trading within the Limits of the East India Company's Charter. [4th August, 1840.]

CAP. 57. An Act to impose Duties of Excise on Sugar manufactured in the United Kingdom. [7th August, 1840.]

CAP. 58. An Act to amend the Acts relating to the River Poddle, in the County and City of Dublin. [7th August, 1840.]

CAP. 59. An Act for the Amendment of the Law of Evidence in Scotland. [7th August, 1840.]

CAP. 60. An Act to further amend the Church Building Acts. [7th August, 1840.]

CAP. 61. An Act to amend the Acts relating to the General Sale of Beer and Cider by Retail in England. [7th August, 1840.]

CAP. 62. An Act to continue until the Thirty-first Day of December, One Thousand Eight Hundred and Forty-one, and to the End of the then next Session of Parliament, the Provisions of an Act to provide for the Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof, and for other Purposes relating thereto. [7th August, 1840.]

CAP. 63. An Act to extend the Powers of the Commissioners appointed for the Execution of Two Acts for supporting the several Harbours and Sea Ports in the Isle of Man. [7th August, 1840.]

CAP. 64. An Act to continue, until Eight Months after the Commencement of the then next Session of Parliament, an Act for authorizing Her Majesty to carry into immediate Execution, by Orders in Council, any Treaties for the Suppression of the Slave Trade. [7th August, 1840.]

CAP. 65. An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England. [7th August, 1840.]

S. 1. Dean of Arches empowered to sit for Judge of Court of Admiralty in certain cases.

S. 2. Advocates, surrogates, and proctors of Court of Arches to be admitted in Court of Admiralty.

S. 3. Whenever a vessel shall be arrested, or the proceeds brought into registry, the Court shall have jurisdiction over the claims of mortgagees.

S. 4. The Court shall have jurisdiction to decide questions of title to the vessel, in all causes of possession, salvage, damage, wages, or bottomry.

S. 5. Appeals may be made to the Court of Admiralty on distribution of salvage.

S. 6. The Court, in certain cases, may adjudicate on claims for services and necessities, although not rendered on the high seas.

S. 7. Evidence may be taken *vivâ voce* in open Court.

S. 8. Evidence may be taken *vivâ voce* before a commissioner.

S. 9. Power to compel attendance of witnesses and production of documents by subpoena.

S. 10. Provisions of 3 & 4 Will. 4, c. 42, extended to Court of Admiralty.

S. 11. Court empowered to direct issues at law.

S. 12. Costs of issues and commissions to be in the discretion of the Court.

S. 13. Court empowered, within three months, to direct new trials of issues.

S. 14. The granting or refusing an issue or new trial may be matter of appeal to the Privy Council.

S. 15. Bills of exceptions to be allowed on trials of issues.

S. 16. Record of the issue and verdict to be transmitted to the Court of Admiralty, and the verdict, unless set aside, to be conclusive as to the facts found.

S. 17. Provisions of 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41, as to appeals, to apply to suits in the Court of Admiralty under this Act. Certified notes of the evidence to be admitted on appeal.

S. 18. Power to the judge of the Court of Admiralty to make rules and orders as to practice, &c. subject to the approbation of the Privy Council.

S. 19. Protection of the judge from actions, &c.

S. 20. Gaolers to receive prisoners committed by the Court of Admiralty, or by admiralty coroners.

S. 21. Power to discharge prisoners in custody for contempt.

S. 22. The Court to have jurisdiction to try questions concerning booty of war referred to it by the Privy Council.

S. 23. Nothing herein contained to affect the jurisdiction of the Courts of Law or Equity.

S. 24. Act may be repealed or amended this session.

CAP. 66. An Act to make Provision for the Judge, Registrar, and Marshal of the High Court of Admiralty of England. [7th August, 1840.]

S. 1. The judge of the Admiralty Court to have a yearly salary of 4000*l.*; to be incapable of sitting as a member of the House of Commons after the present parliament.

S. 2. Repeal of 50 Geo. 3, c. 116. Registrar of the Court to be paid out of

the fee-fund a salary of 1400*l.*, which may under extraordinary circumstances be increased, on the recommendation of the judge, to 2000*l.*

S. 3. Appointment of registrar.

S. 4. Registrar to attend the Privy Council at the hearing of causes and appeals.

S. 5. Marshal of the Court to receive out of the fee-fund a salary of 500*l.*, besides travelling and other expenses, which may under extraordinary circumstances be increased, on the recommendation of the judge, to 800*l.*

S. 6. Officers, clerks, and servants of the Court to be appointed by the judge, subject to the approval of the Admiralty.

S. 7. Provision for retiring pension to judge of 2000*l.*

S. 8. Manner and times of payment of salaries and annuities.

S. 9. Office of registrar not to be executed by deputy except in the cases therein mentioned.

S. 10. Appointment of deputy registrar in case of illness, &c.

S. 11. Judge of the Admiralty may direct the appointment of an assistant registrar, with a salary not exceeding 1200*l.*

S. 12. Account of increase in salaries and appointments to be laid on the table of the House of Commons within fourteen days.

S. 13. Her Majesty may regulate and alter the table of fees in the Court.

S. 14. Registrar to account annually for all fees received by him: subordinate officers to account to registrar.

S. 15. Fees to be carried to fee-fund.

S. 16. Surplus to be paid to the consolidated fund.

S. 17. Treasury, by warrant, to direct the payments aforesaid to be made out of the consolidated fund.

S. 18. Judge, registrar, assistant registrar, or marshal, to take no fees or emoluments except their salary.

S. 19. Accounts with which the Treasury are dissatisfied may be referred to the judge of the Court of Admiralty and the Dean of Arches.

S. 20. Act may be amended or repealed this session.

CAP. 67. An Act for carrying into Effect the Treaty between Her Majesty and the Republic of Venezuela, for the Suppression of the Slave Trade.

[7th August, 1840.]

CAP. 68. An Act to enable Her Majesty in Council to authorize Ships and Vessels belonging to Countries having Treaties of Reciprocity with the United Kingdom to be piloted, in certain cases, without having a licensed Pilot on board; and also to regulate the Mode in which Pilot Boats shall be painted and distinguished.

[7th August, 1840.]

CAP. 69. An Act to continue, for Six Months after the Commencement of the next Session of Parliament, an Act of the last Session of Parliament, for carrying into effect a Convention between Her Majesty and the King of the French relative to the Fisheries on the Coasts of the British Islands and of France.

[7th August, 1840.]

CAP. 70. An Act to defray the Charge of the Pay, Clothing, and contingent and other Expenses of the Disembodied Militia in Great Britain and Ireland; and to grant Allowances in certain cases to Subaltern Officers, Adjutants, Paymasters, Quartermasters, Surgeons, Assistant Surgeons, Surgeons' Mates, and Serjeant Majors of the Militia, until the First Day of July, One Thousand Eight Hundred and Forty-one.

[7th August, 1840.]

CAP. 71. An Act to suspend until the End of the next Session of Parliament the

making of Lists, and the Ballots and Enrolments, for the Militia of the United Kingdom. [7th August, 1840.]

CAP. 72. An Act to provide for the Solemnization of Marriages in the Districts in or near which the Parties reside. [7th August, 1840.]

S. 1. No superintendent registrar to give any certificate of notice of marriage, where the building in which the marriage is to be solemnized, as stated in the notice, shall not be within the district where one of the parties has been resident, except as hereinafter enacted.

S. 2. Any party giving notice may declare by indorsement thereon the religious appellation of the body of Christians to which he professes to belong, and the form which the parties desire to adopt in solemnizing their marriage, and that there is not within the district in which one of the parties resides any registered building in which marriage is solemnized according to such form, and the nearest district in which a building is registered where marriage is so solemnized: and in such case the registrar may issue his certificate under the Act, and the marriage may be solemnized accordingly. Marriages not to be subsequently invalidated by evidence to disprove the truth of the facts stated in the notice.

S. 3. Form of notice.

S. 4. Persons making false declarations guilty of perjury: prosecutions limited to eighteen months after the marriage.

S. 5. Quakers and Jews may continue to solemnize marriage according to their usages, after due notice and certificate, although the building be not within the districts in which they reside.

S. 6. Act may be amended or repealed this session.

CAP. 73. An Act to explain and amend the Acts relating to Friendly Societies.

[7th August, 1840.]

S. 1. Stat. 10 Geo. 4, c. 56, s. 37, not to be construed to extend to grant exemption from stamp duty to any friendly society requiring enrolment, where the sum to be assured to any individual exceeds 200*l*.

S. 2. No society assuring to any individual more than 200*l*. to be entitled to invest its funds in savings' banks, or with the National Debt Commissioners.

S. 3. Societies enrolled under 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, and deprived by this Act of exemption from stamp duty, &c., empowered to adopt a rule to appoint nominees to receive the sums assured.

S. 4. On future investments by any friendly society in savings' banks, or with the National Debt Commissioners, the treasurer or trustees shall make a declaration of conformity to this Act, in such form as the commissioners shall direct; and if it be not true, the money paid on it to be forfeited to the commissioners, and applied pursuant to 9 Geo. 4, c. 92, s. 34.

S. 5. Act may be amended or repealed this session.

S. 6. Act to extend to the United Kingdom.

CAP. 74. An Act for the better Protection of the Oyster Fisheries in Scotland.

[7th August, 1840.]

CAP. 75. An Act to regulate the Repayment of certain Sums advanced by the Governor and Company of the Bank of Ireland for the Public Service.

[7th August, 1840.]

CAP. 76. An Act to empower the Lord Lieutenant of Ireland to annex certain Townlands to the County of Roscommon. [7th August, 1840.]

CAP. 77. An Act for improving the Condition and extending the Benefits of Grammar Schools. [7th August, 1840.]

CAP. 78. An Act to provide for the Sale of the Clergy Reserves in the Province of Canada, and for the Distribution of the Proceeds thereof. [7th August, 1840.]

CAP. 79. An Act to amend the Law relating to the Admission of Attornies and Solicitors to practise in the Courts of Law and Equity in Ireland. [7th August, 1840.]

CAP. 80. An Act to continue, until the First Day of March, One Thousand Eight Hundred and Forty-five, and from thence to the End of the then next Session of Parliament, the several Acts relating to Insolvent Debtors in India. [7th August, 1840.]

CAP. 81. An Act to define the Notice of Elections of Members to serve in Parliament for Cities, Towns, and Boroughs in England. [7th August, 1840.]

S. 1. In every city, town, borough, &c. the sheriff or other officer shall proceed to election within eight days after the receipt of the writ, giving three *clear* days' notice, exclusive of both the day of proclamation and the day of election.

S. 2. Act may be amended or repealed this session.

CAP. 82. An Act for further amending the Act for abolishing Arrests on Mesne Process in Civil Actions. [7th August, 1840.]

S. 1. Stat. 1 & 2 Vict. c. 110, s. 14, to apply to the interest of any judgment debtor, as well in the stocks, funds, &c. therein mentioned, as in the dividends and interest thereof: and a judge may make the same order as to the interest of a debtor in funds standing in the name of the Accountant-General of the Court of Chancery or Exchequer, or the dividends or interest thereof, as if they had been standing in the name of a trustee for the debtor: but no such order to prevent the Bank or any public company from permitting a transfer of the funds, or to have any greater effect than if the debtor had charged them in favour of the creditor with the same amount.

S. 2. No judgment, decree, &c. to affect real estate as to purchasers, &c. at law or in equity, until a memorandum thereof left with the senior master of the Common Pleas.

CAP. 83. An Act to continue, until the First Day of January, One Thousand Eight Hundred and Forty-three, an Act of the last Session of Parliament, for amending and extending the Provisions of an Act of the First Year of Her present Majesty, for exempting certain Bills of Exchange and Promissory Notes from the Operation of the Laws relating to Usury. [7th August, 1840.]

The Act 2 & 3 Vict. c. 37, continued to 1st January, 1843.

CAP. 84. An Act for better defining the Powers of Justices within the Metropolitan Police District. [7th August, 1840.]

S. 1. Repeal of 2 & 3 Vict. c. 47, ss. 75 & 76.

S. 2. The queen in council may constitute police court divisions, and define and alter their extent and number: the number of police magistrates not to exceed twenty-seven.

S. 3. So much of 2 & 3 Vict. c. 71, as requires the daily attendance of a police magistrate at the courts, to apply only to the courts already established.

S. 4. Police magistrates may be ordered to attend at such other courts, and at such times, as the queen in council shall direct.

S. 5. Orders in council to be published in the Gazette.

S. 6. Any two justices may act with the authority of a police magistrate; but within the divisions assigned to any police court not otherwise than at such court; and where the regular attendance of a police magistrate is ordered, he is to be, when present, the sole acting magistrate.

S. 7. The provision of 2 & 3 Vict. c. 47, as to the employment of clerks, to apply only to the police courts now established.

S. 8. Forms of recognizance, information, and conviction directed.

S. 9. Extension of power of magistrates to discharge prisoners on recognizance.

S. 10. Militia balloting lists to be made out by police constable.

S. 11. Penalty of 10*l.* for obtaining money by threatening an information.

S. 12. Appeal given to the police magistrates from proceedings at the leet respecting weights and measures.

S. 13. The powers of justices, under 11 Geo. 2, c. 19, and 57 Geo. 3, c. 52, as to giving possession to landlords of deserted premises, may be exercised, within the metropolitan police district, by police constables under the warrant of a police magistrate.

S. 14. Horse and foot patrol, and Thames police, declared to be within the provisions of 2 & 3 Vict. c. 47, for superannuation allowances.

S. 15. Two justices of the city of London to have within the city the same powers as two justices have under this Act within the metropolitan police district.

S. 16. Act may be amended or repealed this session.

CAP. 85. An Act for the Regulation of Chimney Sweepers and Chimneys.

[7th August, 1840.]

S. 1. Continues the act 4 & 5 Will. 4, c. 35, till 1st July, 1842.

S. 2. From and after 1st July, 1842, any person compelling or allowing a child or person under twenty-one to enter a chimney to sweep it, &c. to be liable to a penalty of not above 10*l.* nor less than 5*l.*

S. 3. No child under sixteen to be hereafter apprenticed to a chimneysweeper.

S. 4. Between 1st July, 1841, and 1st July, 1842, apprentices to chimney sweepers may apply to and be discharged by two justices.

S. 5. Indentures of children under sixteen to chimney sweepers to become void on 1st July, 1842.

S. 6. Regulating the construction of chimneys.

Ss. 7 to 12 provide for the mode of convictions for penalties, levying and application of penalties, appeal, &c. &c.

S. 13. Act may be amended or repealed this session.

CAP. 86. An Act for better enforcing Church Discipline.

[7th August, 1840.]

CAP. 87. An Act to enable her Majesty's Commissioners of Woods, Forests, Land Revenues, Works, and Buildings, to make additional Thoroughfares in the Metropolis.

[7th August, 1840.]

CAP. 88. An Act to amend the Act for the Establishment of County and District Constables.

[7th August, 1840.]

CAP. 89. An Act to exempt, until the Thirty-first Day of December, One Thousand Eight Hundred and Forty-one, Inhabitants of Parishes, Townships, and Villages from Liability to be rated as such, in respect of Stock in Trade or other Property, to the Relief of the Poor.

[10th August, 1840.]

S. 1. Inhabitants not to be taxed in respect of their ability derived from the profits of stock in trade or any other property, to the relief of the poor; but nothing herein to affect the liability of a parson or vicar, or occupier of the hereditaments mentioned in 49 Eliz. c. 2.

S. 2. Act to be in force till 31st December, 1841.

CAP. 90. An Act for the Care and Education of Children who may be convicted of Felony.

[10th August, 1840.]

S. 1. Court of Chancery empowered to assign the care of any infant convicted

of felony, to any other than the testamentary or natural guardian; to rescind or alter such arrangement; and to award costs in certain cases.

S. 2. Infant not to be sent beyond sea, or out of the jurisdiction of the Court.

S. 3. No fee to be taken by the officer of the Court; and counsel may be assigned gratuitously.

S. 4. This act not to interfere with the execution of the sentence passed upon the infant on conviction.

CAP. 91. An Act for the more effectual Prevention of Frauds and Abuses committed by Weavers, Sewers, and other Persons employed in the Linen, Hempen, Union, Cotton, Silk, and Woollen Manufactures in Ireland, and for the better Payment of their Wages, for One Year, and from thence to the End of the then next Session of Parliament. [10th August, 1840.]

CAP. 92. An Act for enabling Courts of Justice to admit Non-parochial Registers as Evidence of Births or Baptisms, Deaths or Burials, and Marriages.

[10th August, 1840.]

S. 1. The registrar-general shall receive, and deposit in the General Register Office, all the registers and records now in the custody of the registrar-general, and such others as are hereinafter directed to be deposited with him, and which shall be sent, within three months, to the commissioners for examination by them.

S. 2. Continuance of commissioners for twelve months, and their duties prescribed.

S. 3. Every office where registers and records shall be deposited by the registrar-general, with the approval of the treasury, to be deemed a part of the General Register Office.

S. 4. Commissioners to identify the registers and records deposited.

S. 5. Lists to be made, which shall be open to search, and certified extracts had therefrom.

S. 6. Registers, &c. deposited under this act (except the registers of the Fleet and King's Bench prisons, May Fair, and the Mint, &c., deposited in the registry of the diocese of London in 1821) to be deemed in legal custody, and to be receivable in evidence in all Courts of justice.

S. 7. Fees to be accounted for according to 4 & 5 Will. 4, c. 15.

S. 8. Wilful injury or forgery of registers felony.

S. 9. Extracts had from registers to be stamped with the seal of the office.

S. 10. Extracts to describe the register whence taken; and the production of a register from the office in the custody of the proper officer, or of a certified copy containing such description, and purporting to be stamped with the seal of the office, to be sufficient evidence that the register is one deposited under this act.

S. 11. Upon notice and copy given to the opposite party, certified extracts may be used in evidence on the trial of any cause at law, and at quarter sessions in civil cases.

S. 12. If the original be used, notice and copy must nevertheless be given.

S. 13. Upon notice and copy given, certified extracts may be used in evidence on the examination of witnesses or the hearing of a cause in equity.

S. 14. If the original be used, notice and copy must nevertheless be given.

S. 15. Certified extracts may be used in interlocutory proceedings in equity, and in the masters' offices.

S. 16. Certified extracts may be pleaded and produced in Ecclesiastical Courts in the same manner as extracts from a parish register, but without proof of collation with the original: but the judge may order the production of the original.

S. 17. In criminal cases the originals to be produced.

S. 18. Rules to be made for regulating the practice as to the reception in evidence of registers, &c., and as to notice, costs, &c.

S. 19. Such rules to be made for the Court of Chancery by the Lord Chancellor and Master of the Rolls, for the Courts of Common Law by eight of the judges, of whom the chiefs to be three, for the Court of Admiralty by the judge of that Court, and for the Ecclesiastical Courts by the official principal of the Court of Arches, with the Chancellor of London or Commissary of Canterbury.

S. 20. The registers excepted in section 6 to be transmitted to the registrar-general for safe custody, but none of the evidence clauses to apply to them.

S. 21. Act may be amended or repealed this session.

CAP. 93. An Act to amend the Act for the better Regulation of Ecclesiastical Courts in England. [10th August, 1840.]

S. 1. The judicial committee of the privy council or judge of any Ecclesiastical Court may order the discharge of persons in custody on any writ de contumace capiendo, with the consent of the other parties to the suit; but such consent not to be necessary after imprisonment for six months, in cases of subtraction of church-rates for an amount not exceeding 5*l.*, and after payment of the sum in question, and the costs.

S. 2. Form of order.

S. 3. Act may be amended or repealed this session.

CAP. 94. An Act for facilitating the Administration of Justice in the Court of Chancery. [10th August, 1840.]

S. 1. The Lord Chancellor, with the advice and consent of the Master of the Rolls and Vice-Chancellor, or one of them, empowered to make alterations in the forms of writs, the mode of issuing and executing them, the mode of filing bills and other proceedings, of obtaining discovery, of pleading, of taking evidence, of practice in Court, of proceedings before the Masters, of drawing up and enrolling orders and decrees, of delivering copies of pleadings, &c. &c.; and to make regulations as to taxation and payment of costs, and for altering and controlling the business of the several offices of the Court, collecting and paying over fees, payment of copy money, &c. &c.: such rules to be laid before parliament, and to take effect, after thirty-six days, in like manner as if enacted by parliament.

S. 2. Power to appoint additional officers.

Ss. 3, 4, contain provisions as to payment of salaries of officers, &c., and compensation for diminution of emoluments.

S. 5. Interpretation clause.

S. 6. Act may be amended or repealed this session.

CAP. 95. An Act to enable her Majesty to carry into effect certain stipulations contained in a Treaty of Commerce and Navigation between her Majesty and the Emperor of Austria; and to empower her Majesty to declare, by Order in Council, that Ports which are the most natural and convenient Shipping Ports of States within whose Dominions they are not situated, may in certain Cases be considered, for all Purposes of Trade with her Majesty's dominions, as the National Ports of such States. [10th August, 1840.]

CAP. 96. An Act for the Regulation of the Duties of Postage.

[10th August, 1840.]

[This Act is only, in substance, a re-enactment of the Treasury warrants by which the postage is now regulated.]

CAP. 97. An Act for regulating Railways. [10th August, 1840.]

- S. 1. No railway to be opened until after a month's notice to Board of Trade.
- S. 2. Penalty of 20*l.* a day for opening railways without such notice.
- S. 3. Returns to be made by railway companies to the Board of Trade.
- S. 4. Parties making false returns guilty of a misdemeanor.
- S. 5. Board of Trade may appoint inspectors of railways.
- S. 6. Penalty on persons obstructing inspectors.
- S. 7. Copies of existing bye-laws to be laid before the Board of Trade within two months, or to be thenceforth void.
- S. 8. No future bye-laws to be valid until two months after they have been laid before the Board of Trade.
- S. 9. Board of Trade may disallow bye-laws.
- S. 10. Provisions of railway acts requiring confirmation of bye-laws by justices, &c. repealed.
- S. 11. Board of Trade may direct prosecutions to enforce provisions of railway acts, after twenty-one days' notice to the company.
- S. 12. Prosecutions to be commenced under authority of the Board of Trade, and within one year after the offence.
- S. 13. Punishment of servants of railway companies guilty of misconduct, drunkenness, &c.
- S. 14. Justice empowered to send any case to be tried by the sessions.
- S. 15. Persons wilfully obstructing railway carriages or engines on the railway or doing any thing to endanger the safety of passengers, guilty of a misdemeanor and liable to imprisonment not exceeding two years.
- S. 16. Punishment of persons obstructing officers of any railway company, or trespassing on a railway.
- S. 17. Proceedings not to be quashed for want of form, or removed by certiorari.
- S. 18. All provisions in railway acts which empower two justices to decide disputes respecting proper places for openings in the ledges or flanches of railways, repealed.
- S. 19. Such disputes hereafter to be decided by the Board of Trade.
- S. 20. Communications to the Board to be left at their office : communications by the Board to be signed by the secretary or other officer appointed for the purpose : service on one director, or on the secretary or clerk, or leaving it with the officer at a station, to be good service on a railway company.
- S. 21. Interpretation clause.
- S. 22. Act may be amended or repealed this session.

CAP. 98. An Act to authorize, for a limited Time, the Application of a Portion of the Highway Rates to Turnpike Roads in certain Townships and Districts.

[10th August, 1840.]

- S. 1. Provisions of 2 & 3 Vict. c. 81, extended to all places and districts maintaining their own highways.
- S. 2. Act may be amended or repealed this session.
- S. 3. Act to continue in force during continuance of 2 & 3 Vict. c. 81.

CAP. 99. An Act for taking an Account of the Population of Great Britain.

[10th August, 1840.]

CAP. 100. An Act for taking an Account of the Population of Ireland.

[10th August, 1840.]

CAP. 101. An Act to amend several Acts relating to the Temporalities of the Church in Ireland.

[10th August, 1840.]

CAP. 102. An Act to amend the Law relating to Court Houses in Ireland.

[10th August, 1840.]

CAP. 103. An Act to amend an Act of the last Session for making further Provisions relating to the Police in the District of Dublin Metropolis.

[10th August, 1840.]

CAP. 104. An Act to transfer to the Commissioners of her Majesty's Woods and Works, and other Commissioners, the several Powers now vested in the Commissioners for repairing the Line of Road from Shrewsbury in the County of Salop to Bangor Ferry in the County of Carnarvon; and to amend the London and Holyhead Roads Acts so far as relates to the Dunstable Road.

[10th August, 1840.]

CAP. 105. An Act for abolishing Arrest on Meane Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for the further Amendment of the Law and the better Advancement of Justice in Ireland.

[10th August, 1840.]

CAP. 106. An Act for raising the Sum of Ten Millions Seven Hundred Fifty-one Thousand Five Hundred and Fifty Pounds by Exchequer Bills, for the Service of the Year One Thousand Eight Hundred and Forty.

[10th August, 1840.]

CAP. 107. An Act to continue and amend the Laws for the Relief of Insolvent Debtors in Ireland.

[10th August, 1840.]

CAP. 108. An Act for the Regulation of Municipal Corporations in Ireland.

[10th August, 1840.]

CAP. 109. An Act to annex certain Parts of certain Counties of Cities to adjoining Counties; to make further Provisions for Compensation of Officers in Boroughs; to limit the Borough Rate; and to continue for a limited Time an Act to prevent the Alienation of Corporate Property in Ireland.

[10th August, 1840.]

CAP. 110. An Act to amend the Laws relating to Loan Societies.

[11th August, 1840.]

CAP. 111. An Act to continue until the Thirty-first day of August, One Thousand Eight Hundred and Forty-two, and to extend the Provisions of an Act of the First and Second Years of her present Majesty, relating to Legal Proceedings by certain Joint Stock Banking Companies against their Members, and by such Members against the Companies.

[11th August, 1840.]

S. 1. The act 1 & 2 Vict. c. 96, further continued until the 31st August, 1842.

S. 2. Members of such companies, who shall steal or embezzle any property of the copartnership, or commit any offence with intent to injure or defraud the copartnership, shall be liable to prosecution and conviction in the name of any of the officers for the time being, in whose name any action or suit might be brought.

CAP. 112. An Act to apply a Sum out of the Consolidated Fund to the Service of the Year One Thousand Eight Hundred and Forty, and to appropriate the Supplies granted in this Session of Parliament.

[11th August, 1840.]

CAP. 113. An Act to carry into effect, with certain Modifications, the Fourth Report of the Commissioners of Ecclesiastical Duties and Revenues.

[11th August, 1840.]

EXTRACTS FROM SIR SAMUEL ROMILLY'S DIARY.

SINCE the article on Sir Samuel Romilly was written, it has struck us that it may be advisable to print in this place some extracts from the Diary, which we omitted for fear of encumbering the narrative.

Remarks on the late Baron Garrow.—"Sir James Mansfield, the Chief Justice of the Common Pleas, has during the whole of this term been prevented by illness from attending in Court; and, as he is in his 80th year, there have been various reports of his intended resignation, and of the promotions which are to take place in consequence of it. Sir Vicary Gibbs, it seems agreed on all hands, is to succeed him; but who is to succeed Gibbs as Chief Baron seems not a little doubtful. For some time it was considered as quite settled that it was to be the Attorney-General (Garrow), and he has himself talked very confidently about it, has made inquiries respecting the probable state of business upon the different circuits, and has observed that it would be an affectation in him to be silent upon what every body else was speaking of. How well qualified he is to preside in a Court in which all questions respecting the rights of the crown in matters of property are decided, may be conjectured from what passed last summer in the House of Lords. On the claim to the Earldom of Airlie, which came on in last July, I, as counsel for the claimant, had endeavoured to remove the objection which had been taken by some of the Lords, particularly Lord Redesdale, that the title had become forfeited by the attainder of Lord Ogilvy in the year 1715. The question was, whether a Scotch entailed title of honour was forfeited by its devolving on an attainted person subsequent to his attainder; or whether (as I had to contend) it was merely suspended during his life, and on his death came to the next heir of entail. Garrow, as Attorney-General on behalf of the Crown, had to answer Adams' and my argument. Perceiving, from his observations to me while the claim was depending, how little he knew of the matter, I was curious to see how, when it came to him to speak, he would extricate himself from his difficulty. He did extricate himself, but in a way for which I certainly was not prepared. He appeared at the bar of the House of Lords with a written argument, the whole of which he very deliberately read, without venturing to add a single observation or expression of his own. In the Stafford peerage, which stood for the same day, he did exactly the same thing. He merely read an argument which somebody had composed for him; and none of the Lords were malicious enough to interrupt him, or to put any questions to him on any of the doctrines which he had to maintain. I have since been informed that both these arguments were written by Hobhouse, one of the solicitors of the Treasury. A very new sort of exhibition this by an Attorney-General! Two days afterwards in the Court of Chancery, on a question whether a manager of a theatre could discharge the duties of his office without personal attendance, I, who had to argue that he could not, said that it would be as difficult as for a counsel to do his duty in that court by writing arguments, and sending them to some person to read them for him. The Lord Chancellor interrupted me by saying, 'In this court or in any other?' And after the Court rose he said to me, 'You know, I suppose, what I alluded to? It was Garrow's written argument in the House of Lords.' So little respect has his Lordship for an Attorney-General whom he himself appointed, because he was agreeable to the Prince."

On the late Sir Thomas Plumer.—"A worse appointment than that of Plumer to be Vice-Chancellor could hardly have been made. He knows nothing of the law of real property, nothing of the law of bankruptcy, and nothing of the doctrines peculiar to courts of equity. His appointment to this office is the more extraordinary, as the Chancellor is fully aware of his incapacity to discharge the duties of it; and as Richards, who is certainly the best qualified for it of any one now in the profession, and whose politics could raise no objection to his promotion, has been always considered as the Chancellor's most private friend.* The Regent certainly cannot have made it a point to have Plumer promoted, since he is one of the avowed authors of the Princess of Wales's defence, which abounds with the most injurious insinuations against the Prince. The only explanation of all this is, that with the rest of the ministry Plumer has a very strong interest; that they have earnestly pressed his appointment, and have represented that it would be a great slight upon him, if he were to be passed by; and that the Chancellor has not on this, as he never has on any former occasion, suffered his sense of duty towards the public, or his private friendship, to prevail over his party politics."

On Masters Jekyll and Stephen.—"Amongst the other obstructions to the prosecution of suits, has been the Chancellor's delay in the appointment of a Master in the place of Mr. Morris. That gentleman died on the [13th] of [April] last, and it was only yesterday that Mr. Jekyll was appointed to succeed him. The Prince's favour has procured him that appointment. As soon as the vacancy happened, it was known that Jekyll was to be appointed. The Chancellor, however, has delayed all this time filling up the office, at very great inconvenience to the suitors, only, as it should seem, to show his sense of the impropriety of the appointment; and a more improper one could hardly be made, for, with a thousand good and amiable qualities as a private man, and with very good talents, Jekyll is deficient in almost every qualification necessary to discharge properly the duties of a Master in Chancery. If the Chancellor had meant to show with what deliberation he could make a bad appointment to a very important judicial office, and, with how strong a sense of the impropriety of it, he could surrender up to the Prince that patronage which it is a duty he owes to the Public to exercise himself, he could not have contrived matters better than he has done. His conduct indeed had been nearly the same when he appointed Mr. Stephen a Master in Chancery; that gentleman had never practised in that Court, and, though a man of very considerable talents, he had not the character of being a lawyer, and his services in Parliament were understood to be his only recommendation. The Chancellor was said to disapprove of such a political appointment to so important a judicial office, but, after a very long delay, he most deliberately made it."

On Sir John Leach.—"Leach has vacated his seat in parliament by accepting the Chiltern Hundreds. This is preparatory to his taking the office of chancellor of the Duchy of Cornwall, to which he is to be immediately appointed. Personal attachment to the Prince, who, he says, has always shown great kindness to him, is the excuse he alleges for accepting a favour from the Regent, to whose government he has been constantly in opposition. The office, he says, is given to him on an express declaration that it is not at all to affect his political conduct; but yet he does not think that it would be proper, while holding such an office, to

* "Richards has since told me, that, while the measure was depending, the Chancellor gave him the strongest reason to believe that he would be the Vice-Chancellor. What he said on the subject was so strong that, as Richards expressed it, coming from any one else, it must have been understood as a direct promise."

appear in active opposition to the Regent's ministers. He therefore retires; and the man he is to bring in as representative of Seaford, of which he has the command, is Sir Charles Cockerell, who will invariably vote with ministers. The plain meaning of all this is, that he has gone over to government; but, to avoid the ridicule and the reproach which commonly attends an immediate and sudden desertion of former friends, he wishes to interpose some decent interval between his past and his future politics. His loss is not very great. His attendance on parliament was not very constant; and, though he always voted, he never once spoke on the side of the opposition. Unless I am much mistaken, in the course of the eight or nine years that he has been in parliament he has only made four speeches, of which two were on matters which personally regarded the Regent, the third was in defence of the Duke of York, and the fourth was against the project of creating a vice-chancellor. He aspires undoubtedly to the highest offices, and is flattered with the expectation of succeeding Lord Eldon as chancellor. His talents are certainly very considerable. He has great facility of apprehension, considerable powers of argumentation, and remarkably clear and perspicuous elocution; but with all this he is, of all the persons almost that I have known in the profession, the worst qualified for any judicial situation. He is extremely deficient in knowledge as a lawyer. All that he knows he has acquired, not by any previous study which would have enabled him to understand the general system of our law, and the grounds and reasons of its particular provisions, but by his daily practice. This has thrown in his way a great deal of desultory information, which a good memory has enabled him to retain. In judgment he is more deficient than any man possessed of so clear an understanding that I ever met with. If ever he should be raised to any great situation, his want of judgment and his extraordinary confidence in himself will, I make no doubt, soon involve him in some serious difficulty. This short sketch of his character would be incomplete, if I did not mention the ambition he has of being thought to unite the character of a fine gentleman to that of a great lawyer. Constant attendance at the opera and at the gayest assemblies, appears, in his opinion, to be as necessary to the support of his reputation, as his presence in Westminster Hall; and he prides himself upon hastening every night from the dull atmosphere of the Rolls and Lincoln's Inn, to the brilliant circles of high birth and fashion."

Lord Ellenborough on the Insolvent Bill.—"Nov. 6th, Saturday. The first day of term. At the Lord Chancellor's Lord Ellenborough came to me the moment he saw me come into the room, to exclaim against Lord Redesdale's Insolvent Debtors' Act, which, he said, was nonsense and unintelligible, and could not be executed. It would be proper, he said, immediately to pass a temporary Insolvent Debtors' Bill on account of the number of prisoners whose expectations had been raised by the present Act. As for Lord Redesdale, he said, he ought to be put in a straight waistcoat. I told him that I did not consider myself as at all answerable for the bill; that as he and the Lord Chancellor had objected to former bills of Lord Redesdale for the same purpose, and had suffered this one to pass, I had conceived it, and had treated it in the House of Commons as sanctioned by him. He said he had suffered it to pass because he was weary of opposing such bills; and he had been given to understand that all the defects in it were to be removed in the Commons. To this I said that I did not believe that Lord Redesdale had communicated with any member of the House of Commons on the subject of the bill, except * * * He said he knew * * *, and that he was a great fool. I did not contradict his lordship."

On Lord Brougham.—"A motion of disapprobation of the increase which has lately been made of the salary of Secretary to the Admiralty, in time of peace, from 3000*l.* to 4000*l.* a year, was rejected by a majority of 29; there being for the motion 130, and against it 159. In the course of the debate upon it, Brougham, who supported the motion, made a violent attack upon the Regent, whom he described as devoted, in the recesses of his palace, to the most vicious pleasures, and callous to the distresses and sufferings of others, in terms which would not have been too strong to have described the latter days of Tiberius. Several persons who would have voted for the motion were so disgusted that they went away without voting; and more, who wished for some tolerable pretext for not voting against Ministers, and who on this occasion could not vote with them, availed themselves of this excuse, and went away too; and it is generally believed that, but for this speech of Brougham's, the Ministers would have been again in a minority. If this had happened, many persons believe or profess to believe that the Ministers would have been turned out. Poor Brougham is loaded with the reproaches of his friends; and many of them who are most impatient to get into office look upon him as the only cause that they are still destined to labour on in an unprofitable opposition. I have no doubt that, whatever had been the division, the Ministers would still have continued in office. But it is not the less true that Brougham's speech was very injudicious as well as very unjust; for, with all the Prince's faults, and they are great enough, it is absurd to speak of him as if he were one of the most sensual and unfeeling tyrants that ever disgraced a throne. Brougham is a man of the most splendid talents and the most extensive acquisitions, and he has used the ample means which he possesses most usefully for mankind. It would be difficult to overrate the services which he has rendered the cause of the slaves in the West Indies, or that of the friends to the extension of knowledge and education among the poor, or to praise too highly his endeavours to serve the oppressed inhabitants of Poland. How much is it to be lamented that his want of judgment and of prudence should prevent his great talents, and such good intentions, from being as great a blessing to mankind as they ought to be."

On Sir W. Grant and Sir John Leach.—"Sir William Grant has resigned the office of Master of the Rolls, to the extreme regret of all those who practised in his court, and to the great misfortune of the public. His eminent qualities as a judge, his patience, his impartiality, his courtesy to the bar, his despatch, and the masterly style in which his judgments were pronounced, would at any time have entitled him to the highest praise; but his mode of administering justice appeared to the greater advantage by the contrast they afforded to the tardy and most unsatisfactory proceedings both of the Chancellor and the Vice-Chancellor. Sir Thomas Plumer succeeds Grant at the Rolls, and Leach is to be Vice-Chancellor in the place of Sir Thomas Plumer. I had before intended to discontinue my attendance at the Rolls when the next session of Parliament commenced; but if I had had no such previous intention, this change would have determined me. Plumer has great anxiety to do the duties of his office to the satisfaction of every one, and most beneficially for the suitors; but they are duties which he is wholly incapable of discharging. There is so general a sense of this in the profession, that, if Leach disposes of the business which will come before him with the expedition which is expected from him, very few causes will probably be hereafter set down at the Rolls. The number of causes entered there for hearing has been of late years unusually great; so great that, notwithstanding Sir William Grant's great despatch, he has left an arrear of more than 500 causes. Causes were set down there with

a twofold object—that Sir William Grant might hear, and that Sir Thomas Plumer might not hear them. Leach, though with a bad judgment, and with little learning in his profession, will, in the present state of the court, be a very useful judge. He is very quick; he has few doubts; he will decide with great despatch, and will not, like the two other judges of the court, hesitate to delay his judgments in the plainest cases. I shall not be surprised if in a few years the contrast between Leach's despatch and the Chancellor's delay becomes so striking, that his lordship will find it difficult to retain his office. That Leach will, by his extraordinary presumption, involve himself in some ridiculous difficulties, is not at all improbable. He dined a few days ago in a company of fourteen persons, all of the profession, and some the intimate friends of Sir William Grant. In the course of conversation it was said that that gentleman's leisure might have been very usefully employed if he had been a member of the House of Lords in assisting the Chancellor in the hearing of appeals in that House; upon which Leach said to one of Sir William Grant's friends, 'If you will undertake that he will give that assistance to the Lord Chancellor, I will undertake that he shall be made a peer.' This was repeated to me in the same words by three persons who were present at the dinner."

The following propositions formed part of papers entitled, "*Memoranda of Things to be done on entering into Office*" (as Chancellor).

"1. To keep lists of persons qualified for the different offices in my appointment, and to designate in my own mind who shall succeed upon the first vacancy: to avoid the evil of the offices remaining long vacant, and to prevent solicitation of candidates.

"2. To find out, and bring forward talents wherever they can be found. In doing this to disregard rank and family and places of education, and, above all, to divest myself of all consideration of personal favour.

"3. Invariably to appoint to offices the men who are most fit to fill them; to do this in every profession and in every department of the state.

"4. In the church, to consider those as best qualified to advance the interests of true religion and of the state who entertain the most liberal opinions; not those who consider the religious order as a kind of corporation, as a profession which has its own particular interests to consult, and between which and the laity there should be kept up, as it were, a continual struggle.

"5. To promote and improve public education in all orders of society.

"6. To reform the public grammar schools.

"7. To reform the Universities, and establish in them new professorships.

"To the second of these propositions is attached a short list of names, and notes to the sixth and seventh refer to books and authorities relating to the powers of visitors, and to the mode in which these powers should be enforced."

The following is a list of such of the essays left by him as are most complete:—

- "1. On the Promulgation of Laws.
2. On a written Code of Laws.
3. Project of a New Code.
4. On unauthorized Reports of Judicial Proceedings.
5. On certain Rules of Evidence.
6. On the Imposition of Taxes on Law Proceedings.
7. On Irrevocable Laws.
8. On the Law of Libel.
9. On Apprenticeships.
10. On Bankrupts.
11. On the Poor Laws.

12. On Divorces among the Poor.
13. On Superstition.
14. On Judicial Superstition.
15. Attempts to reform Defects and Abuses in Criminal Law.
16. On a Public Prosecutor.
17. On Ignominious Punishments.
18. On Cruel Punishments.
19. On Military Punishments.
20. On the Regard to be had to Sex, Age and condition of Life in inflicting Punishment.
21. On Punishments to Children.
22. On Transportation.
23. On Conspiracies to convict innocent Men.
24. On Confession and Denial after Conviction.
25. On Perjury.
26. On the Punishment of Perjury.
27. On Shoplifting.
28. On Petty Treason and Murder.
29. On Appeals of Death.
30. Account of a Criminal Trial in Scotland.
31. On Suicide.
32. On Blasphemy.
33. On Bigamy.
34. On Felony.
35. On the Clergy as amenable to Criminal Law.
36. On Forestalling and Regrating.
37. On Laws against unusual Crimes.
38. On allowing Counsel to Persons accused.
39. On Compensation to Persons wrongfully accused.
40. On the Policy of giving Rewards on Conviction.
41. On frequent Public Executions.
42. Observations on Eliza Fenning's case.
43. Observations on Bentham on Punishment.

"It was respecting that portion of these Essays which relates to the criminal Law, and some other papers not here enumerated, that the direction in a codicil to his will, mentioned in the preface to the first volume, refers."

The high character of the editors and executor affords ample assurance that a sound discretion has been exercised in depriving the public of these. The executor appears to have been principally influenced by considerations drawn from subsequent amendments of the criminal law, and the progress made by Sir Samuel Romilly's principles since his death.

Note on the Author of The Adventures of an Attorney in Search of Practice.
Second Edition.

THE author of this book is angry with us for suggesting that his hero (whom he chooses to identify with himself) is deficient in self-respect and superficially acquainted with society. Hopeless of gaining sympathy on this score, he is trying to induce his own branch of the profession to make common cause with him by raising a cry that their honour and respectability are assailed in his person. The attempt is ingenious, but we shall disappoint him by reprinting the paragraph to which he alludes:—

“Two of the characters in ‘Pelham’ are made to discuss the question whether illegitimacy presents an insuperable bar to a man’s being perfectly a gentleman. They decide that it does not, provided the individual has self-respect and strength of mind sufficient to subdue any consciousness of inferiority, which would be fatal to that ease and independence of demeanour which are absolutely essential to the character. Just so, if an attorney feels no consciousness of inferiority—and most assuredly there is no earthly reason why an attorney, well educated and well connected, should feel any consciousness of the sort—he will find himself, during periods of social intercourse, on a perfect footing of equality with the bar. In fact, we could name many members of what is called the inferior branch of the profession, who, from literary reputation or political influence, would be received with much more consideration in general society than an undistinguished barrister. But the worst of it is, a great deal of paltry jealousy, originating in this very consciousness, prevails; and it is perfectly clear to our minds, that Mr. Sharpe has hitherto tried in vain to convince himself of the actual existence of that perfect equality he is contending for. If so, why is he eternally harping on the point? or why so angry at the very limited description of exclusiveness which is still thought necessary to sustain, not the rank or the dignity, but the bare independence and respectability of the bar?”—*L. M.* vol. xxii. p. 378.

This paragraph speaks for itself. He does not venture to quote it, but after a wretched attempt at humour, he commences a formal reply to something he supposes to have been said in this manner:—

“But to be serious, if one can be serious on such a topic, and if I wish to be so, it is only because I am challenged to the controversy, is it possible that the reviewer can suppose that this high stilting about ‘rank’ and ‘dignity’ and ‘visible superiority’ in times like the present, can have any other effect than to create a smile at his expense.”—*Preface to the Second Edition*, p. x.

Who challenged him to a controversy? or where does he find any high stilting about rank and dignity? unless he insists on reading the sentence where these words occur, as Charles the Second’s courtiers read the seventh commandment, without the *not*. The term “visible superiority” occurs in a passage afterwards quoted from Serjeant Talfourd, but he no more dreamed of applying it in an invidious sense, or guessed that he was stating a debateable proposition, than if he had declared that

baronets were inferior in social rank to marquisses, or that peers occupied a station of visible superiority to commoners,—which this gentleman would probably answer by saying that Sir Robert Peel was more esteemed by his party than Lord Londonderry, and Mr. Howard of Corby better born than Lord Carrington. Sir Samuel Romilly must be equally in fault, when he says :

“My father endeavoured, however, by his conversation to give me a favourable opinion of the way of the life of a lawyer, an attorney I should say, for his ideas certainly soared no higher.”—*Memoirs*, vol. i. p. 18.

It strikes us to be almost a self-evident proposition to assert that the calling which holds out the most tempting objects to ambition, and attracts all the recruits of promise, possesses a visible superiority. When a young man distinguishes himself at the university, and is recommended to follow the law, which branch of the profession does he join ? or which is the more frequent occurrence—an articled clerk becoming a bar-student, or a bar-student becoming an articled clerk, as either happens to gain a reputation for ability ?

It were a waste of time to pursue the topic, as we entertain no doubt that this weak, irritable, and injudicious writer's advocacy will be generally repudiated. He names Mr. Whittle Harvey as one of the illustrations of his order !

H.

EVENTS OF THE QUARTER.

AMONG the most reprehensible proceedings of the present ministry since their first accession to office, was their abandonment of the Lord Chancellor's Bill regarding the administration of justice in equity. When the influential men of all parties were agreed,—when the profession as well as the public were clamouring for it,—it is suddenly given up under a feigned apprehension of a speech from Sir Edward Sugden, though it was perfectly well known that, had he divided against the measure, he would have divided by himself. The real motive was much of the same nature as that which had occasioned so much difficulty in supplying the last vacancies on the bench. The appointment of two new equity judges would have proved exceedingly embarrassing to a government who are obliged to weigh not merely the qualifications of a candidate but the effect his promotion might have upon their majority in the House of Commons. If, by shifting Mr. Baron Rolfe, they made room for the Solicitor-General on the bench, they would risk the loss of his seat and that of his successor; and if the Attorney-General gained nothing by the arrangement, he might turn restive or strike work. They extricated themselves from the dilemma by throwing up the bill. Lord Brougham, highly to his credit, instantly brought forward another, embodying what many thought the most valuable part of the discarded measure, namely, the clauses empowering the equity judges to effect such changes as they may deem expedient in the pleadings and practice of their Courts. The debate on this bill in the House of Commons was principally distinguished by Mr. Pemberton's clear and unanswerable exposure of the existing evils.¹ These have also been set forth in a petition signed by most of the leading London solicitors and presented to the House of Commons towards the end of the session, so that it will be hardly possible even for the present government to procrastinate beyond the next session.

The Report of the Bankruptcy and Insolvency Commissioners has been presented, and is in print. We shall review it very shortly. They propose many sweeping changes; amongst others, the abolition of the Court of Review, the consolidation of the bankruptcy and insolvency jurisdictions, and the entire abolition of imprisonment for debt.

The following notices have been given for the next session:—

Mr. Hume.—Bill to alter and amend the Reform Act for England and Wales (2 & 3 Will. 4, c. 45), so as to extend the suffrage to all householders, and to all occupants of parts of houses rated to the poor; to afford protection to the voters against intimidation and bribery; to shorten and fix the duration of parliaments.

Major Chetwynd.—Select committee to inquire into the administration of the law, civil as well as criminal, and especially on the circuits.

Mr. Hawes.—Bill to disqualify, after the present parliament, persons holding certain judicial offices from being elected or sitting as members of the House of Commons.

Mr. Fitzroy Kelly.—Bill for the further abolition of the punishment of death.

¹ Mr. Pemberton's speech has since been published in the form of a pamphlet.

Mr. Fitzroy Kelly.—To call the attention of the House to the subject of secondary punishments under the law as now administered.

Mr. Fitzroy Kelly.—Bill to enable the freemen of certain boroughs to vote in the election of town councillors for such boroughs.

Mr. James Stewart.—Address to her Majesty, that it may be her Majesty's pleasure to cause a commission to issue to inquire into the expediency of adopting some plan for consolidating and digesting the Common Law of England, as contained in the reports of the superior Courts of Law and Equity, and for improving the present mode of reporting such decisions.

Mr. Milnes.—Bill to alter and modify the restrictions of the law of mortmain, as far as they regard all spiritual corporations.

Sir Edward Sugden.—Select committee to inquire into the administration of justice in the Courts of Chancery and Equity Exchequer, and in the House of Lords, and the Judicial Committee of the Privy Council, and to report their opinion thereon.

We deeply regret to have to record the death of Mr. Tyrrell, the eminent conveyancer, to whom we have been indebted for many useful hints and much valuable information during the progress of this work. From a short memoir in the *Legal Observer* we collect, that he was the son of the late city remembrancer, and received his education at Eton,—entered young at Lincoln's Inn,—became the first pupil of Sir Edward Sugden,—and was called to the bar in 1815. In 1829 he published his *Suggestions*, addressed to the Real Property Commission, of which he soon after became a member. His labours in this capacity are familiar to all persons who have followed the progress of improvement in this branch of the law. The Report on Wills, and the Act founded on it, are understood to have been prepared almost exclusively by him. But his exertions were not limited to this peculiar field: he took an eager interest in all proposed changes directly or indirectly connected with professional matters; and it latterly became a fashion for amateur legislators of all sorts to consult with him. His assistance was readily afforded, and invariably tended to the practical improvement of the scheme. No one who knows the important place he filled amongst law reformers can doubt that many measures of importance to the community will be indefinitely retarded by his death.

The annual revision has been completed without exposing the revising barristers to quite so much odium as in former years; but it is clear that they will never be able to perform their duty satisfactorily until the existing doubts have been set at rest by a declaratory Act, or an appeal court.

Oct. 27, 1840.

LIST OF NEW PUBLICATIONS.

The Practice of Conveyancing; comprising Rules for the Preparation and Examination of all Ordinary Abstracts of Title, together with the Law of Evidence connected with the Title to Real and Personal Property. Second Edition. Vol. III. By James Stewart Esq., of Lincoln's Inn, Esq., Barrister at Law. Royal 8vo. price 22s. boards.

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An Abridgment of the Cases upon the Subject of the Poor Law decided since the passing of the 4 & 5 Wm. 4, c. 76, and a collection of the subsequent Enactments upon the same Subject. By William Golden Lumley, Esq., Barrister at Law, one of the Assistant Secretaries of the Poor Law Commissioners. In 1 Vol. 8vo. price 10s. 6d. cloth.

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